TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 849.

GERALD PURCELL FITZ GERALD, PLAINTIFF IN ERROR,

vs.

JOSIAH V. THOMPSON, AS TRUSTEE FOR LIDA ELEANOR PURCELL FITZ GERALD ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED NOVEMBER 4, 1911.

(22,925.)

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Gerald Purcell Fitz Gerald, appellant, and Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, infants, by William McClelland, their Guardian ad litem, appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
2 of a clause of the Constitution, or of a treaty, or statute, of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 14th day of October, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

3 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1911.

No. 109.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, By William McClelland, Their Guardian ad Litem, Plaintiffs Below and Appellees,

vs.

GERALD PURCELL FITZ GERALD, Defendant Below and Appellant.

Petition for Writ of Error.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

The petition of Gerald Purcell Fitz Gerald respectfully showeth:

That on October 27, 1910, the Plaintiffs did file in the Court of Common Pleas of Fayette County in the State of Pennsylvania, their Bill of Complaint and a Citation was issued upon the Defendant, your petitioner to show cause why the prayers therein set forth should not be granted—the service being made upon Charles E. Lenhart, hereinafter mentioned, the said Lenhart being alleged to be your Petitioner's attorney in fact.

That the Defendant, your Petitioner, did thereupon petition for the removal of the cause to the United States Circuit Court for the Western District of Pennsylvania, be cause of the diverse citizenship of the parties—the Defendant Gerald Purcell Fitz Gerald being before the time of the filing of the said Bill, at the said time
4 and since, a resident of Ireland and a subject of the King of Great Britain and Ireland and having at no time been a citizen of the United States or a resident of the State of Pennsylvania, while all the other parties to the action were and are citizens of the United States and residents of the State of Pennsylvania. As shown by the Defendant's petition for removal, Charles E. Lenhart, who, was originally joined in the Bill as co-defendant, is not an active, necessary or substantially interested party to the suit and your petitioner avers that said Lenhart was wrongfully and improperly joined in the Bill of Complaint as a party defendant for the mere purpose of wrongfully ousting the jurisdiction of the Federal Courts by the colorable joinder of a resident and a non-resident as parties defendant, although said Lenhart had no active or substantial interest as a defendant. Your petitioner suggests to the Court that this is shown by the fact that the separate Demurrer and separate Answer filed by said Lenhart were disregarded and the case went to trial in the Fayette County Court in spite of the said Demurrer filed by Lenhart and with the same undisposed of and with his said Answer not considered, alluded to or disposed of, and with him tak-

ing no part in the trial except as a witness for the Plaintiffs and that the Bill was therafter dismissed entirely as to said Lenhart as partner and manager, and he thereupon dropped out of the case except as trustee, in which capacity his interests are opposed to the Defendant, your Petitioner, and his name no longer appears as a party on either side, except in his adverse position as a trustee, interested in sustaining the trust and no decree of any kind was entered against him, but on the contrary, the Decree was directed solely and exclusively against your Petitioner.

5 Your petitioner avers that the matter in dispute is between Josiah V. Thompson, as Trustee, and Lida Eleanor Purcell Fitz Gerald on the one side, and Gerald Purcell Fitz Gerald, individually, on the other side and that the real and actual controversy is over the validity of the trust agreement set forth at length in the Bill of Complaint and over the right of the trsutees to collect from the Defendant (or from certain of his properties) certain sums of money for the benefit of the cestui que trustents, all of whom are made plaintiffs in the suit. In this controversy, the Plaintiffs uphold the validity of the agreement and the right to collect the money while the defendant, Gerald Purcell Fitz Gerald, denies their right and alleges the trust agreement to be wholly void. The said Lenhart, therefore, has absolutely no interest as a defendant and if interested at all in the case, it is only as a co-trustee of said Josiah V. Thompson, in upholding the agreement, which interest, if any, is of like character with that of said Thompson and contrary to the interests of said Fitz Gerald, the Defendant. The real and actual controversy is and was, therefore, between citizens of the United States and residents of Pennsylvania on the one side, and a citizen and resident of Great Britain and Ireland on the other side.

The Defendant, in his petition, therefore prayed the Court below that the said Bill in Equity, suit or action, might be removed from the Court of Common Pleas of Fayette County, Pennsylvania, to the Circuit Court of the United States in and for the Western District of Pennsylvania, at Pittsburg, and did then and there file the necessary bond; but the said Court of Common Pleas, on
6 November 30, 1910, did erroneously refuse to make an order transferring the suit to the Circuit Court of the United States for the Western District of Pennsylvania, to which action of the Court the said Defendant excepted and a Bill of Exceptions was then and there duly sealed on the thirtieth day of November, 1910, which Exception was, to wit, on April 1, 1911, after argument, overruled and dismissed.

And thereafter, to wit, on April 1, 1911, the said Defendant Gerald Purcell Fitz Gerald did except to the order overruling and dismissing his Exception and at his instance a Bill of Exceptions was sealed. Thereupon, the said Defendant did appeal to the Supreme Court of Pennsylvania, which, on April 5, 1911, issued its certiorari to bring up the record from the said Court of Common Pleas of Fayette County; and on the same day, the said Defendant duly filed his assignments of error.

That upon the argument of the said appeal to the Supreme Court of the State of Pennsylvania, the said Supreme Court dismissed the

Exception filed by your petitioners and affirmed the judgment of the Court of Common Pleas of Fayette County, State of Pennsylvania, the Court holding that:

"As this is not a controversy wholly between citizens of different States, the petition of the Appellant for a transfer of the proceedings to the Circuit Court of the United States for the Western District could no have been allowed."

That the judgment of the said Supreme Court of the State of Pennsylvania is the judgment of the highest court of record of said State and that the judgment of the said Court is final.

That the decision and judgment of the Supreme Court of Pennsylvania is erroneous, inter alia, in that it overruled the Defendant's eleventh Assignment of Error, which was:

7 "The learned Court erred in refusing upon the petition of the Defendant, Gerald Purcell Fitz Gerald, to proceed no further in said suit and to transfer the said suit to the Circuit Court of the United States for the Western District of Pennsylvania, and in deciding that the Courts of the United States had not jurisdiction.

Your petitioner therefore prays for the allowance of a Writ of Error to the Supreme Court of Pennsylvania, in order that the judgment of the said court may be so examined and reversed or affirmed in the Supreme Court of the United States.

And he will ever pray.

GERALD PURCELL FITZ GERALD,
By His Attorneys, JAMES GAY GORDON,
MICHAEL J. RYAN.

8 COMMONWEALTH OF PENNSYLVANIA,
City of Philadelphia, ss:

On the 12th day of October A. D., 1911, before me, the subscriber, personally appeared James Gay Gordon and Michael J. Ryan, who, being duly sworn according to law, depose and say that the above petition is not presented for the purposes of delay, but because the deponents believe injustice has been done the petitioner and that the facts set forth in the said petition are true and correct, to the best of their knowledge and belief.

JAMES GAY GORDON,
MICHAEL J. RYAN.

Sworn to and subscribed before me this 12th day of October A. D. 1911.

[Seal of Henry J. Rebman, Notary Public.]

HENRY J. REBMAN,
Notary Public.

Commission expires March 13th, 1913.

9 Know all men by these presents, That we, James Gay Gordon and Michael J. Ryan, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of Twenty-five Hundred Dollars ($2500.) to be paid to the said

Commonwealth of Pennsylvania, its certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated the — day of October in the year of our Lord one thousand nine hundred and eleven.

Whereas lately at a session of the Supreme Court of Pennsylvania, in a suit depending in said Court between Josiah V. Thompson and others, Plaintiffs, and Gerald Purcell Fitz Gerald, defendant, to No. 109, January Term, 1911, in the Supreme Court of Pennsylvania, judgment was rendered against the said Gerald Purcell Fitz Gerald, defendant, and the said Gerald Purcell Fitz Gerald, defendant, having procured a writ of error and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiffs citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington on the — Monday of —— next.

Now the condition of the above obligation is such that if the said Gerald Purcell Fitz Gerald shall prosecute his writ of error to effect, and answer all damages and costs, if he fail to make his plea
10 good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of

JAMES GAY GORDON.
MICHAEL J. RYAN.

Witness:
HENRY J. REBMAN.
ALLEN S. MORGAN.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

James Gay Gordon and Michael J. Ryan, being duly sworn according to law, deposes and says that they are the owners of real estate in their own name and right situated in the county of Philadelphia, Pennsylvania, worth at least Five Thousand Dollars ($5,000.) over and above all indebtedness, liens and encumbrances of any kind.

JAMES GAY GORDON.
MICHAEL J. RYAN.

Sworn to and subscribed before me this 12th day of October, A. D. 1911.

[SEAL.]

HENRY J. REBMAN,
Notary Public.

Commission expires March 13th, 1913.

Approved:
HORACE H. LURTON,
Associate Justice of the Supreme Court U. S.

Oct. 14, 1911.

11 [Endorsed:] Appeal Bond. (Copy).

12 UNITED STATES OF AMERICA, *ss:*

To Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein Gerald Purcell Fitz Gerald is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace H. Lurton, Associate Justice of the Supreme Court of the United Statse, this 14th day of October, in the year of our Lord one thousand nine hundred and eleven.

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

13 NEW YORK, *October* 18, 1911.

I, attorney of Record for Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald; John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, infants, by William McClelland, their Guardian, ad litem, defendants in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

SAM'L UNTERMYER,
Attorney for the Above-named Defendants in Error.

14 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1911.

No. 109.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Plaintiffs Below and Appellees,

vs.

GERALD PURCELL FITZ GERALD, Defendants Below and Appellant.

Assignments of Error.

Now comes the above defendant and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Pennsylvania erred in holding and deciding that the petition of Gerald Purcell Fitz Gerald, the Appellant, (he being a citizen and subject of the United Kingdom of Great Britain and Ireland) filed with a proper bond in the Court of Common Pleas of Fayette County, State of Pennsylvania, for a 15 transfers of the proceedings from the said Court to the Circuit Court of the United States for the Western District of Pennsylvania, could not be allowed and was properly and lawfully refused by the said Court of Common Pleas of Fayette County; and in affirming the action and judgment of the said Court of Common Pleas of Fayette County in refusing the said petition for a transfer of the proceedings from the said Court of Common Pleas of Fayette County, Pennsylvania, to the Circuit Court for the Western District of Pennsylvania.

For which errors the said defendant, Gerald Purcell Fitz Gerald, prays that the said judgment of the Supreme Court of the State of Pennsylvania, dated July 6th, 1911, be reversed and a judgment rendered in favor of the defendant and for costs.

WIILIAM A. STONE,
Per R.
Attorney for Gerald Purcell Fitz Gerald.

16 [Endorsed:] In the Supreme Court of Pennsylvania, Eastern District, January Term, 1911. No. 109. Josiah V. Thompson, as Trustee, &c., et al., vs. Gerald Purcell Fitz Gerald. Assignments of Error. William A. Stone, Attorney for Gerald Purcell Fitz Gerald. Michael J. Ryan, James Gay Gordon, also of Counsel for Appellant.

17 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

618.

Between

Josiah V. Thompson, as Trustee for Lyda Eleanor Purcell Fitz Gerald and Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald of the Trusts Hereinafter Described; Lyda Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice, Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

Gerald Purcell Fitz Gerald, Individually and as Trustee of the Trusts Hereinafter Described; Charles E. Lenhart, as Trustee of the Trusts Hereinafter Described; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

Howell, S. & M. Guggenheimer, Untermyer and Marshall.

R. McK. & M., M. J. Ryan, J. G. Gordon, and Wm. A. Stone, for G. P. Fitz Gerald d. b. e.

Johnson & Rush for C E. Lenhart, d. b. e.

Printers	$61.20
Sh'ff Johns	4.50
Printers	17.00
"	9.00
"	3.00
"	3.00

And now, to wit: Oct. 27", 1910, Printed bill of Complaint to remove defendants Gerald Purcell Fitz Gerald and Charles E. Lenhart as Trustees and for appointment of new Trustees and to establish a lien upon the properties of the Copartnership known as Fayette Coke Company and Shamrock Supply Company; and for the construction of the trust agreement and instructions to the Trustees, and for an accounting by the defendants, Fitz Gerald and Lenhart: and for payment of all sums due and to become due upon agreement described in Bill, and to restrain 18 the alienation or encumbering of the properties of said Copartnership and for the appointment of a Sequestrator or Receiver of certain proportions of the share of the defendant Fitz Gerald in the rents, issues and profits of said Copartnership; and for general relief.

And now, October 27", 1910, Petition of Lyda Eleanor Purcell

Fitz Gerald praying the appointment of William McClelland as guardian Ad Litem for John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, infant plaintiffs in the above styled case, — presented to Court, and upon consideration thereof, the appointment is made as prayed for. Per Curiam.

R. E. UMBEL, *P. J.*

Same day petition for appointment of Sequestrator or Receiver filed October 27", 1910, petition herein presented, and upon consideration thereof, the Courts directs a citation to issue upon said Gerald Purcell Fitz Gerald and Charles E. Lenhart to show cause why the prayer of the petitioner should not be granted, returnable in ten days; service to be made upon Lenhart as Attorney in fact specially empowered by Gerald Purcell Fitz Gerald by letter of Attorney dated June 19", 1909, recorded July 3", 1909, in Recorder's office of Fayette County, Pennsylvania, in Agreement Book 22, page 33, wherein amongst other things, said Fitz Gerald did provide as follows: "And I also authorize my said Attorney to appear for me in any Court of Justice, to any action or other proceeding which may be instituted against me or whereunto I shall be a party, and to defend the same or suffer Judgment to be had or given against me in any such action or proceeding by default or otherwise, as he, my said Attorney, shall be advised or thinks proper." Returnable in ten days.

By the Court.

R. E. UMBEL, *P. J.*

19 October 27", 1910, Citation and two copies issued.

Now, November 3", 1910, upon application on behalf of the defendant, Gerald Purcell Fitz Gerald it is ordered and decreed that an extension of ten days be granted to the defendants upon the order heretofore made October 27", 1910, Per Curiam.

R. E. UMBEL, *P. J.*

November 11", 1910, Robinson, McKean and Martin, Michael J. Ryan, James Gay Gordon and William A. Stone by their præcipe approved and filed, enter their appearance d. b. e. for Gerald Purcell Fitz Gerald one of the above named defendants. Same day Johnson and Rush by their præcipe approved and filed enter their appearance d. b. e. for Charles E. Lenhart one of the above named defendants. Same day motion to set aside service filed.

And now, November 11", 1910, motion presented and ordered filed and place- on the Argument List. By the Court. R. E. Umbel, P. J. September Term 1910, on Argument List. November 14", 1910. Citation returned. October 28", 1910, Served this writ on the within named Gerald Purcell Fitz Gerald, individually and as Trustee and Charles E. Lenhart Trustee and Gerald Purcell Fitz Gerald and Charles E. Lenhart partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart manager of Fayette Coke Company and Shamrock Supply Company defendant by handing a true and attested copy hereof to Charles E. Lenhart personally (and by making known to him the contents thereof) together with a copy of the plaintiff's bill. So answers Peter A. Johns, Sheriff $4.50.

And now, November 15″, 1910, it is agreed by and between Howell, Sturgis and Morrow, Attorneys for plaintiffs in above styled suit, and Robinson, McKean and Martin, of Counsel for the defendants, that the time for the filing of an answer to the bill in this case and for the filing of an answer to the rule to show cause why a Sequestrator or Receiver should not be appointed, granted October 27″,
1910, be extended until December 1″, 1910. It is further
20 agreed that the motion to set aside the service of the Bill of
Complaint on Gerald Purcell Fitz Gerald be withdrawn and that a general appearance be entered for him. Signed—Howell, Sturgis and Morrow, Attorneys for plaintiffs. Robinson, McKean and Martin, Attorneys for defendants.

Now, November 15″, 1910, the above stipulation presented and ordered filed and the Court fix Thursday December 1″, 1910, at 10 A. M. as the time for hearing on citation to show cause why a Sequestrator or Receiver should not be appointed. Per Curiam. November 28″, 1910, Petition for the removal of cause to U. S. Circuit Court and Bond filed.

Now, November 30″, 1910, this matter came on to be heard and was argued by counsel; and now, eo die, upon and after due consideration the order praying for transferring the suit to the Circuit Court of the United States for the Western District of Pennsylvania is refused. By the Court.

Now, November 30″, 1910, the petitioner Gerald Purcell Fitz Gerald by his counsel excepts to the within order refusing to transfer the suit to the Circuit Court of the United States for the Western District of Pennsylvania and at his instance bill is sealed.

ROBERT E. UMBEL, *P. J.* [SEAL.]

And now, November 30″, 1910, upon motion of H. L. Robinson of counsel for Gerald Purcell Fitz Gerald, the hearing on the application for the appointment of a Sequestrator or Receiver in this case continued until December 14″, 1910, at 10 A. M. the present stipulation as to the filing of answer to bill and petition to continue in force. Per Curiam. And now, November 30″, 1910, separate answers of Gerald Purcell Fitz Gerald, defendant filed. November 30″, 1910. Interrogatories to the plaintiff, Josiah V. Thompson filed. November 30″, 1910, motion to strike from the record petition for Receiver, etc. filed. November 30″, 1910, Demurrer to petition for appointment of Receiver etc. filed. December 6″, 1910 separate Demurrer of Charles E. Lenhart, partner and manager. December
6″, 1910, separate answer of Charles E. Lenhart, Trustee.
21 December 9″, 1910, Replication to separate answer of defend-
ant Charles E. Lenhart filed. December 9″, 1910, Replication to separate answer of defendant Gerald Purcell Fitz Gerald filed December 12″, 1910 Answer of Josiah V. Thompson, Trustee to Interrogatories filed.

And now, December 22", 1910, The plaintiffs enter a rule for a Commission to be issued to Thomas H. D. Berridge Esq., of No. 11 Old Broad Street, London, England, to take the testimony of witnesses on the annexed interrogatories, to be read in evidence on behalf of the plaintiffs on the trial of the entitled cause. Same day service of the above rule is accepted by Robinson, McKean and Martin Solicitors for defendant Gerald Purcell Fitz Gerald and by Johnson and Rush Solicitors for defendant Charles E. Lenhart. December 27", 1910, Exceptions of Gerald Purcell Fitz Gerald to answer of Josiah V. Thompson Trustee to Interrogatories filed. January 14", 1911 Cross Interrogatories to be propounded to William T. Barnard K. C. and Sir Edward Carson K. C. on behalf of the defendant filed and defendant Gerald Purcell Fitz Gerald names as Commissioner on his behalf, Richard Hazleton Esq., House of Commons, London, England. January 18", 1911. Exit Commission.

And now, February 4", 1911, the defendant Gerald Purcell Fitz Gerald files Interrogatories and enters a rule for a Commission to be issued to Alexander Pollock, 27 Ely Place, London, England and Ernest Bird, 5 Grays Inn Road, London, England, or either of them to take the testimony of Norman Craig, K. C. M. P. Edward Himmerde K. C., Robert Frederick Bayford, K. C. Arthur Houston, K. C. and W. E. Hume Williams, K. C. M. R., on interrogatories to be read in evidence on behalf of Gerald Purcell Fitz Gerald the defendant above named, on the trial of the above entitled cause. Same day service accepted by W. J. Sturgis, Attorney for plaintiffs. Febr'y 11", 1911. Amendment to Commission filed. Same day notice accepted by W. J. Sturgis, Attorney for plaintiffs. Febr'y 25", 1911, Cross Interrogatories to be propounded to Norman Craig K. C. M. P.,
Edward Himmerde K. C., Robert Frederick Bayford K. C.,
22 Arthur Houston, K. C., W. E. Humer Williams K. C. M. P.,
Rt. Hon. Arthur Cohen P. C. K. C., on behalf of the plaintiffs filed, and notice of filing accepted by Robinson, McKean and Martin, Attorneys for defendant. Febr'y 25", 1911. Exit Commission. February 28", 1911, Supplemental answer of Josiah V. Thompson, Trustee to Interrogatories filed. March 15", 1911. Plaintiffs request for finding of facts and conclusion of law filed. Same day Defendants request for finding of facts and conclusions of law filed. Same day notes of testimony filed. Same day Opinion and Decree of Court filed.

Decree.

Now, March 3", 1911, this cause came on to be heard at this Term and was argued by counsel; and now, March 15", 1911, thereupon upon consideration thereof, it is ordered and adjudged and decreed as follows:—Viz.

1. That the defendant, Gerald Purcell Fitz Gerald, forthwith pay to the Trustees for the benefit of Lyda Eleanor Purcell Fitz Gerald the sum of sixteen thousand four hundred and sixty, ($16,460.00) dollars, and that the said Trustees pay the same to Lyda Eleanor Purcell Fitz Gerald.

2. That the defendant, Gerald Purcell Fitz Gerald, forthwith pay

to the Trustees for the benefit of Lyda Eleanor Purcell Fitz Gerald and John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, minor children of the said defendent, Gerald Purcell Fitz Gerald and of the said Lyda Eleanor Purcell Fitz Gerald, the sum of five thousand three hundred and eighty eight ($5,388.00) dollars, upon the trusts set forth in paragraph third of the agreement, dated December 6″, 1906, and set forth at large in the Bill filed herein.

3. That the payments provided for in said agreement of December 6″, 1906, be and the same are hereby adjudged to be a lien on all the right, title and interest of the defendant, Gerald Purcell Fitz Gerald, in and to the real property described in paragraph ninth of the Bill filed herein and known as the Fayette Coke Company property.

23 4. That the defendant, Gerald Purcell Fitz Gerald, be and is hereby removed from his office as Trustee of the trusts created by said agreement of December 6″, 1906, and he is hereby directed to account for and pay over to Josiah V. Thompson and Charles E. Lenhart Trustees of the trusts created by said agreement of December 6″, 1906, and to the Trustees to be hereinafter chosen by them, the said Thompson and Lenhart, or appointed by the Court in place of the said Gerald Purcell Fitz Gerald, all sums in his hands, or for which he is accountable under said agreement of December 6″, 1906.

5. That Richard W. Dawson, Esq., be and is hereby appointed Referee to take and state the account of the said defendant, Gerald Purcell Fitz Gerald, as Trustee aforesaid and report the same to the Court and upon final confirmation of said report that judgment be entered against the said Gerald Purcell Fitz Gerald for the amount found due on such accounting.

6. That Josiah V. Thompson and Charles E. Lenhart, Trustees as aforesaid, are hereby directed to appoint some competent and judicious person as Trustee in place of the said Gerald Purcell Fitz Gerald within ten days; in case they are unable to agree they shall report their disagreement to the Court forthwith at the expiration of said period of ten days.

7. That the defendant, Gerald Purcell Fitz Gerald, be and is hereby restrained and enjoined from anywise alienating, encumbering or otherwise disposing of his interest in the property of the Fayette Coke Company and in the property of the Shamrock Supply Company unless and until there shall first have been accumulated in the hands of the Trustees under the said agreement of December 6″, 1906, the sum of three hundred thousand dollars as provided by paragraph third of said agreement.

8. That the defendant, Gerald Purcell Fitz Gerald, pay the costs of this proceeding.

By the COURT.

March 24″, 1911, Printed Exceptions of Gerald Purcell 24 Fitz Gerald defendant filed. March 24″, 1911, Additional Exceptions filed. March Term 1911, on Argument List.

Now, March 31", 1911, this being the time fixed by the Court for argument of the exceptions and additional exceptions of Gerald Purcell Fitz Gerald filed March 24", 1911, in this cause, the parties by their counsel appear and are heard: And now, April 1", 1911, thereupon upon consideration thereof, it is ordered, adjudged and decreed that all of said exceptions and additional exceptions be and the same are hereby overruled and dismissed.

By the COURT.

Attest.

WM. McCLELLAND, *Proth'y.*

Now, April 1", 1911, the defendant Gerald Purcell Fitz Gerald by his counsel excepts to the foregoing order and at his instance a bill is sealed.

ROBERT E. UMBEL, [SEAL.]
President Judge.

April 5", 1911, Certiorari from Supreme Court received and filed. Same day bond in the sum of \$50,000.00 with George S. Harah as surety filed and approved, by R. E. Umbel, P. J. Same day assignments of error filed. Same day Certificate of Robert E. Umbel President Judge that sum involved is over \$1500.00.

25 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. —.

Between

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcel Fitz Gerald, of the Trusts Hereinafter Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guadian ad Litem, Plaintiffs,

and

Gerald Purcell Fitz Gerald, Individually and as Trustee of the Trusts Hereinafter Described; Charles E. Lenhart, as Trustee of the Trusts Hrereinafter Described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Coke Company, and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company, and Shamrock Supply Company, Defendants.

Bill to remove defendants Gerald Purcell Fitz Gerald and Charles E. Lenhart as trustees, and for appointment of new trustees; and to establish a lien upon the properties of the copartnerships known as Fayette Coke Company and Shamrock Supply Company; and for the construction of the trust agreement and instructions to the trustees; and for an accounting by the defendants Fitz Gerald and Lenhart; and for payment of all sums due and to become due upon agreement described in bill; to to restrain the alienation or encumbering of the properties of said copartnerships; and for the appointment of a sequestrator or receiver of certain proportions of the share of the defendant Fitz Gerald in the rents, issues and profits of said copartnerships; and for general relief.

To the Honorable the Judges of said Court:

Your orators complain and say:

Paragraph I.

Your orator, the said Lida Eleanor Purcell Fitz Gerald, is a citizen of the State of Pennsylvania, having her domicile at Uniontown, in said County, and being temporarily, from time to time, abroad with her children, said John Purcell Fitz Gerald, Edward Maurice Fitz-Gerald and Gerald Purcell Fitz Gerald, who are wards of the High Court of Chancery of England and are required, except as
26 hereinafter set forth, to reside in England and Ireland.

Paragraph II.

Your orator Josiah V. Thompson is a resident of Uniontown, Fayette County, State of Pennsylvania; and is also a trustee under the instrument hereinafter recited.

Paragraph III.

At the time of the filing of this Bill, your honorable Court duly appointed William McClelland, Prothonotary, Guardian ad litem of the infant plaintiffs John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald.

Paragraph IV.

The defendant Gerald Purcell Fitz Gerald is a resident of the Island of Waterford, Ireland, and is a subject of the United Kingdom of Great Britain and Ireland, and owns the hereinafter described real estate, situate within the jurisdiction of this Court, and is a trustee under the instrument hereinafter recited.

Paragraph V.

The defendant Charles E. Lenhart, is a resident of Manellen Township, Fayette County, State of Pennsylvania, and engaged as manager of Fayette Coke Company, a partnership, and Shamrock Supply Company, a partnership; and is also a trustee under the instrument hereinafter recited.

Paragraph VI.

Said Fayette Coke Company is a partnership, composed of the defendant Gerald Purcell Fitz Gerald, owning an undivided nine-tenths interest, and the defendant Charles E. Lenhart, owning an undivided one-tenth interest, and holding title to the hereinafter described tracts of coal and land, and operating thereon a coke plant, situate in said Menallen Township and within the jurisdiction of this Court. 27

Paragraph VII.

Said Shamrock Supply Company is a partnership, composed of the defendant Gerald Purcell Fitz Gerald, owning an undivided nine-tenths interest, and the defendant Charles E. Lenhart, owning an undivided one-tenth interest, and operating a general merchandising store at the coke works of the Fayette Coke Company aforesaid, and within the jurisdiction of this Court.

Paragraph VIII.

By agreement, dated December 6, 1906, and recorded August 1, 1910, in Agreement Book 22, page 304, in the Recorder's office of Fayette County aforesaid, the defendant Gerald Purcell Fitz Gerald and the plaintiff Lida Eleanor Purcell Fitz Gerald agreed with each other and with the plaintiff Josiah V. Thompson and the defendant Charles E. Lenhart, for divers good and valuable considerations, in words as follows:

"This indenture made the sixth day of December one thousand nine hundred and six between Gerald Purcell Fitz Gerald of the island Waterford in Ireland, (hereinafter referred to as 'the hus-

band'), of the first part, Lida Eleanor Purcell Fitz Gerald, wife of the said Gerald Purcell Fitz Gerald (hereinafter referred to as 'the wife'), of the second part and Josiah V. Thompson of Uniontown, Pennsylvania, United States of America, Charles E. Lenhart of Uniontown aforesaid, and the said Gerald Purcell Fitz Gerald (hereinafter referred to as 'the trustees') of the third part. Whereas the husband and wife were married in the year 1899 and there has been issue of such marriage three children and no more, viz: John Purcell Fitz Gerald born the 23rd September 1899, and Edward Maurice Fitz Gerald and Gerald Purcel Fitz Gerald twin children born the 25th October 1900. And whereas on the 21st February, 1906, the wife commenced proceedings in Ireland against the husband for a divorce and on the 5th day of December 1906 a decree of divorce against him a mensa et thoro was pronounced
28 on her said petition by the High Court of Justice in Ireland,
and now the husband and wife hereby severally covenant and agree as follows:

1. The husband agrees to pay to the wife by quarterly payments alimony at the rate of Three Thousand Pounds per annum from the 5th day of December one thousand nine hundred and six to the twelfth day of August one thousand nine hundred and seven or to the date of the passing of the Act of Parliament dissolving her said marriage if passed earlier than the twelfth August one thousand nine hundred and seven the wife undertaking to make no application in the meantime to the Court for alimony.

2. As from the date of the passing of the Act of Parliament finally dissolving the marriage of the husband and wife and in consideration of the premises the husband will pay to the Trustees in trust and for the uses and purposes hereinafter set forth so much of his share of the profits accruing annually from and out of the properties known as the Fayette Coke Company and the Shamrock Supply Company situate at Shamrock near New Salem, Fayette County, Pennsylvania, United States of America, as will yield an annuity of Fifteen Thousand Dollars per annum for three years and after three years so much of his share of the said profits therefrom as will yield an annuity of Twenty Thousand Dollars per annum, the said annuity or annuities respectively to be collected from the said companies and paid to the wife by and through the trustees in such lawful manner and at such times as they shall determine but not less often than in the sums of Five Thousand Dollars on January first, May first and September first, for the first three years and Five Thousand Dollars on December first, March first, June first and September first of each year after the said three years to be due and payable to the wife for and during the term of her natural life.

3. For the consideration aforesaid the husband will also pay to the Trustees out of the balance of his nine-tenths share of the profits arising out of the said two companies named above to be paid to and collected by the Trustees from time to time from the passing of the said Act of Parliament in manner as follows to wit: One-third of his said share of the said profits after deducting the said annuities

above provided for, such payments to be made to the Trustees at the end of each financial year of the said companies after the ascertainment of the said yearly profits, the first of such payments
29 to be made on February first one thousand nine hundred and
seven on the profits calculated as from the first of September one thousand nine hundred and six, and such payments shall be invested by them until a total sum of Three Hundred Thousand Dollars has accumulated in the hands of the Trustees, whereupon the Trustees shall pay to the wife on the first February One thousand nine hundred and eight and on the first February in each succeeding year thereafter for and during her natural life one-half of the income received from the investment of the said Three Hundred Thousand Dollars or of so much thereof as at the date thereof shall have been received and invested by such Trustees and shall in their discretion either accumulate or expend the other half of such income for the benefit of the said children of the husband and wife, videlicit: John, Edward, and Gerald Fitz Gerald or the Trustees may pay the entire income to the wife in their absolute discretion until the eldest surviving child shall have attained the age of twenty-one years. In case the wife should die the entire income from the Trust Fund shall belong to the children. If all the children should die before the death of the wife the children's share of the income from the said fund may be paid to her in the discretion of the Trustees, and if not paid to her shall be paid to the husband or to his executors, administrators or appointees.

4. After any of the said children shall have attained the age of twenty-one years such child shall be entitled as of right to be paid his share in the one-half of the income of said Trust Fund, and the discretion of the Trustees to pay more than one-half of the entire income of the Trust Fund to the wife shall cease and determine. On the death of the wife after the youngest child has attained the age of twenty-one years the Trustees shall pay or distribute the remainder of the Trust Fund and any accumulation thereon amongst said children or the survivor or survivors of them.

5. In the event of the death of the wife during the minority of the children and the death of all the children before attaining the age of twenty-one years the fund and any accumulations thereon shall be paid to the husband or to his executors, administrators or assigns. The share of the income of any child dying during the minority shall be paid to or appropriated for the benefit of the surviving child or children.

6. The Trustees for the said annuity funds and the said Trust Fund shall be three in number and any two of them may act for all and the decision of any two shall bind the three. The Trustees appointed by this instrument shall be the said Josiah V. Thompson,
Charles E. Lenhart and Gerald Purcell Fitz Gerald. In the
30 event of the death, resignation or permanent disability to
act of any of the Trustees or of their successors such vacancy shall be supplied by the appointment made by the two remaining trustees or on their failure to so appoint either of the trustees and also the wife shall have the right to petition the Court of Common

Pleas of said Fayette County, Pennsylvania, United States of America, to fill such vacancy or vacancies and power is hereby given to said Court to do the same, and all of the rights and duties imposed upon the Trustees herein named shall attach to and belong to such new Trustee or Trustees.

7. In consideration of the benefits to be obtained by the foregoing provisions in her favor the wife hereby agrees that in the event of the act of divorce becoming law that any right she may have to dower, alimony or otherwise under the laws of any of the United States of America or of Great Britain or Ireland shall be extinguished by and merged in this agreement, the execution whereof by her shall be deemed and taken to be a waiver by her of all such rights to all intents and purposes as affecting the property of the husband.

8. And the husband for the consideration aforesaid covenants and agrees to and with the Trustees that he will not encumber or alien nor suffer to be encumbered or aliened any portion of his interest in said Fayette Coke Company and said Shamrock Supply Company without the consent of the Trustees until said fund of Three Hundred Thousand Dollars has been accumulated.

9. In case of disputes by any party interested as to the meaning of any of the foregoing provisions such dispute shall be settled and determined by the judgment and decision of the Trustees.

10. The Trustees join in the execution hereof for the purpose of declaring their acceptance of said Trust.

11. It is hereby agreed by and between the husband and the wife that the following provisions relating to their said children shall take effect from the time of the passing of the said Act of Parliament, the present arrangements of the children spending two months with each parent continuing until then.

(*a*) The wife (except as to three consecutive months in each year) upon the demand of the husband, shall have the custody, control and maintenance of the said three children, and the husband agrees not to oppose their removal beyond the jurisdiction of the Courts of Great Britain or Ireland during nine months of any year.

31 (*b*) Upon the death of the wife custody, control and maintenance of the said children shall revert to the husband.

(*c*) The husband agrees that during the three months in which he may claim the society and companionship of the said children in any year they or either of them may be accompanied by a nurse, governess, tutor or servant appointed by the wife. The husband to give the wife at least two months' notice in each year of the particular three months of that year during which he desires their custody.

(*d*) The wife shall have the rights to the society and companionship of the three children during the nine months of any year, but agrees that they shall be sent to a boarding school in England to be agreed by the husband and wife, from the time when they reach the age of ten years, except as to the child Gerald, who need not go to a boarding school before eleven years, and that while they are at school she will not remove them therefrom nor claim that more than half of any vacation or holiday enjoyed by the children shall be spent with her.

(e) The wife undertakes not to retain the children in residence in London during the months in which fog is prevalent or is likely to prevail.

12. The husband agrees not to challenge or controvert the fact that the wife enjoys the status of a citizen of the State of Pennsylvania, United States of America, and the wife undertakes if she continues to assume the husband's name until remarriage that she shall not style herself or be known as Mrs. Purcell Fitz Gerald unless in conjunction with the name of Gerald or Lida Eleanor.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first in these presents written.

GERALD PURCELL FITZ GERALD. [SEAL.]

Signed, sealed and delivered by the said Gerald Purcell Fitz Gerald in presence of

GEORGE G. LEWIS,
Ely Place, Holborn, E. C., Solicitor.

LIDA ELEANOR PURCELL FITZ GERALD. [SEAL.]

Signed, sealed and delivered by the said Lida Eleanor Purcell Fitz Gerald in presence of: 32

JOHN PRIDE, *Sol.,*
19 *Upper Ormond Quay, Dublin.*

JOSIAH V. THOMPSON. [SEAL.]

Signed, sealed and delivered by the said Josiah V. Thompson in presence of:

FRANCIS M. SEMENS, JR.,
Ben Lomond St., Uniontown, Pa.,
Ass't Cashier, First Nat. Bank.

CHARLES E. LENHART. [SEAL.]

Signed, sealed and delivered by the said Charles E. Lenhart in the presence of

FRANCIS M. SEMANS, JR.,
Ben Lomond St., Uniontown, Penna.,
Ass't Cashier, First Nat. Bank.

33 *(Proof for Record.)*

"PENNSYLVANIA,
Fayette County, ss:

Be it known that on this first day of August A. D. 1910 before me a Notary Public of Pennsylvania, residing at Uniontown, said county, personally appeared Francis M. Semans, Jr., who being duly sworn was examined by me and did depose and say as follows: That he is the Francis M. Semans Jr. who signed the attached indenture dated December 6, 1906, between Gerald Purcell Fitz Gerald, Lida Eleanor Purcell Fitz Gerald and Josiah V. Thompson and Charles E. Lenhart, having signed the same as a witness to the signatures of said Josiah V. Thompson and Charles E. Lenhart; that he knows Gerald Purcell Fitz Gerald and Lida Eleanor Purcell Fitz Gerald and has seen each of them write and subscribe his and her respective names; that to his certain knowledge said Gerald Purcell Fitz Gerald and George G. Lewis who signed said instrument as a witness to the signature of Gerald Purcell Fitz Gerald, and Lida Eleanor Purcell Fitz Gerald and John Pride, who signed said instrument as a witness to the signature of said Lida Eleanor Purcell Fitz Gerald, are at this time out of and beyond the State of Pennsylvania and any point within the United States of America and cannot be had within the United States of America, but their exact location at this time abroad is not to deponent known; that he has carefully examined the signatures of said Gerald Purcell Fitz Gerald and Lida Eleanor Purcell Fitz Gerald attached to the foregoing instrument and signed thereto, and he believes said signatures to be in the genuine handwriting of said Gerald Purcell Fitz Gerald and Lida Eleanor Fitz Gerald respectively; that he saw said Charles E. Lenhart sign and seal said instrument as his act and deed; and further saith not.

FRANK M. SEMANS, Jr.

Certified to, sworn to and subscribed before me the date aforesaid.

GEO. W. SEMANS, [NOTARIAL SEAL.]
Notary Public.

My commission expires end next session of Senate.

PENNSYLVANIA,
Fayette Co., ss:

On this August first A. D., 1910, before me a Notary Public of Pennsylvania, residing at Uniontown said county, personally appeared the within named Josiah V. Thompson and duly acknowledged the within instrument to be his act and deed and desired it to be recorded as such.
34

Witness my hand & notarial seal the date aforesaid.

[NOTARIAL SEAL.] GEO W. SEMANS,
Notary Public.

My commission expires end of next session of Senate."

Paragraph IX.

The property referred to in Paragraph 2 of the aforesaid agreement as "The Fayette Coke Company and The Shamrock Supply Company" consists of sundry parcels of real estate and a general merchandizing store, title to which vested in said defendant Gerald Purcell Fitz Gerald, and thereafter for the undivided one-tenth in said defendant Charles E. Lenhart, by the following instruments of record at Uniontown, in the Recorder's office of Fayette County, Pennsylvania, to wit:

No. 1.

Jacob S. Hackney and Wife
to
Gerald Purcell Fitz Gerald.

Deed.

Dated November 20, 1899.
Recorded March 7, 1900.
Deed Book 173, page 446.
Consideration $48,000.

Conveys two tracts of land in the Menallen and German townships, said county, the first being situate in the Menallen township and bounded by land of Edgar S. Hackney, Lidia Tracy, heirs of Joshua W. Scott, and public road; beginning at stone in line of Tracy heirs at corner of Edgar S. Hackney, thence by Tracy S. 73° 38′ W. 13.44 P. to stone corner of J. W. Scott, by same S. 9° E. 130.18 P. to point in center of public road, by center of public road and John Hackney heirs N. 56 deg. E. 6 P. to stone in road, N. 24 deg. E. 48.8 P. to center of road, N. 57⅜ deg. E. 37.75 P. to center of road, and by Edgar S. Hackney, N. 25¾ deg. W. 80.64 P. to stone, place of beginning, containing thirty-five acres and twenty-seven perches more or less;

Second. Situate partly in German and partly in Menallen tp., and bounded by land of John Sapper, John E. Finley, James Vail, James Campbell, Samuel E. Finley and public road leading from New Salem to Uniontown, beginning in center of road at corner of Samuel E. Finley, thence by Finley S. 18⅝ deg. W. 108.6 P. to post corner of James Campbell, and by Campbell and Vail 35 S. 58 deg. 35′ E. 142.9 P. to stone in John E. Finley line, by same N. 38⅜ deg. E. 108.3 P. to stone, S. 51 deg. E. 8.41 P. to stone, N. 38¼ deg. E. 39 P. to stone in line of John Sapper, N. 51½ deg. W. 8.45 P. to White Oak, thence by same No. 15 deg. 39′ W. 22.42 P. to center of road, leading from New Salem to Uniontown, by center of road N. 86¼ deg. W. 24.1 P. to center of road, and by center of road and John Hackney heirs N. 74 deg. 35′ W. 105.35 P. to center of road, and by center of road and John Hackney heirs No. 77 deg. W. 48.17 P. to center of road at beginning, containing 140 acres and 40 perches more or less.

No. 2.

Isabella Hackney
to
Gerald Purcell Fitz Gerald.

Deed.

Dated November 18, 1899.
Recorded, March 7, 1900.
Deed Book 176, page 383.
Consideration, $70,511.71.

Conveys tract of land in said Menallen tp.; beginning in center of road from New Salem to Uniontown in line of John Sapper, by Sapper N. 15 deg. 39′ W. 116.38 P. to W. O.; by same N. 46 deg. W. 53.7 P. to stone; N. 25 deg. 20′ E. 65.3 P. to W. O.; N. 44 deg. 35′ E. 31.6 P. to line of Edgar S Hackney; by Hackney N. 51 deg. W. 12.3 P. to post; by same N. 53⅛ deg. W. 38 P. to stone; by same N. 25¾ deg. W. 36.36 P. to center of road, and by road and Hackney S. 57⅜ deg. W. 37.75 P. to center of road, and by same and Hackney S. 24 deg. W. 48.8 P. center of road; and by same and Hackney S. 56 deg. W. 6 P. to center of road in line of Joshua Scott, and by Scott S. 9 deg. E. 18 P. to stone, the same 62½ deg. E. 8.25 P. stone, the same S. 63½ deg. W. 97.25 P. to line of Samuel E. Finley, by Finley S. 19⅞° E. 46.9 P., S. 72 deg. W. 10.5 P., S. 11⅝ deg. W. 84.4 P. to center of first mentioned road, and by road and said Finley and Hackney S. 77 deg. E. 68.4 P. to center of road; S. 74 deg. 35′ E. 105.35 P. to center of road; and by Hackney S. 86¼ deg. E. 24.1 P. to center *or* road the place of beginning, containing 198 acres and 15 perches more or less.

No. 3.

Edgar S. Hackney and Wife
to
Gerald Purcell Fitz Gerald.

Deed.

Dated January 20, 1900.
Recorded March 7, 1900.
Deed Book 178, page 85.
Consideration, $27,202.50.

36 Conveys tract of land in Menallen tp., beginning at stone corner of Rockwell and J. & H. H. Hackney, thence by Hackney S. 25 deg. 28′ E. 1927.5 ft. to stone, S. 52 deg. 36′ E. 822.4 ft. to corner of Sapper, by same No. 46 deg. 40′ E. 345.6 ft. to W. O. tree, N. 66 deg. 48′ E. 606.8 ft., N. 52 deg. 46′ W. 642.7 ft., N. 18 deg. 31′ E., 272.1 ft., S. 83 deg. 3′ E. 255.7 ft., N. 68

deg. 52′ E. 209.4 ft., N. 51 deg. 3′ W. 1987 ft., S. 76 deg. 51′ W. 788.5 ft. to beginning, containing 64.001 acres.

No. 4.

Samuel C. Rockwell and Wife
to
Gerald Purcell Fitz Gerald.

Deed.

Dated January 18, 1900.
Recorded April 16, 1900.
Deed Book 178, page 208.
Consideration $343.88.

Conveys parcel of land in Menallen tp.; beginning at stake thence by Fitz Gerald formerly Edgar S. Hackney, S. 75 deg. 6′ W. 292.8 ft., and by Taylor Jeffries, formerly Thomas Scott, N. 51 deg. 42′ W 319 ft., by Lydia Tracy formerly William Whitesides, S. 6 deg. 46′ W. 275.6 ft. to beginning, containing 0.8597 of an acre.

No. 5.

Samuel E. Finley and Wife
to
Gerald Purcell Fitz Gerald.

Deed.

Dated June 6, 1900.
Recorded, June 6, 1900.
Deed Book 180, page 439.
Consideration $1245.00.

Conveys parcel of land in German tp.: Beginning in center line of Hackney Branch of S. W. P. R. R. on division line of Jacob D. Antram and S. E. Finley, thence by division line N. 44 deg. 8′ E. 31.6 ft., thence parallel to and 30 ft. distant from said center line S. 64 deg. 22′ E. 2118.6 ft., thence by a curve to left with radius of 4092 ft. a distance of 482.6 ft., thence N. 59 deg. 19′ E. 36.9 ft., thence as in three preceding courses parallel to and 30 ft. distant from center line of said Railroad by curve to right with radius of 508 ft. a distance of 52.5 ft. to division line of S. E. Finley and Fayette Coke Co., thence by division line S. 23 deg. 29′ W. 45.7 ft. to center line of said Railroad, and by same course a further distance of 52.1 ft., thence parallel to and 30 ft. distance from center line of said Railroad S. 59 deg. 19′ W. 9.7 ft., thence by curve to right with radius of 552 ft. a distance of 541.4 ft., thence as in two preceding courses parallel to and 30 ft. distant from center line of said Railroad N. 64 deg. 22′ E. 2138.6 ft. to division line btween S. E.

Finley and Jos. D. Antram, thence by division line 44
37 deg. 8′ E. 31.6 ft. to beginning, containing 3.709 acres.

Excepting and reserving however thereout and therefrom all the nine foot vein of coal underlying said tract of land, together with all mining rights and other rights, liberties and privileges, with release of damages which were previously conveyed by the first parties to Charles H. Foote by deed of July 10, 1899, Deed Book 159, page 324. And subject also to the option contained in said Deed to said Foote, his heirs and assigns, to purchase any part of said tract, or parcel of land herein conveyed at a price mentioned in said deed, together with the right and privileges irrevocable to the said Gerald P. Fitz Gerald, his heirs and assigns, of surveying and locating and of constructing and erecting on said tract of land such railroad tracks and appurtenances, buildings, improvements, structures and fixtures as he shall deem proper; and also for the same consideration and the further consideration hereinafter mentioned, the parties of the first part for themselves, their heirs and assigns do hereby release the said Gerald P. Fitz Gerald, his heirs and assigns, from all claims, demands, costs and charges for or on account of any and all damages by reason of the location, construction and maintenance of the said buildings, improvements, structures or fixtures, on and over the said land; as a further consideration of the foregoing grant the said Fitz Gerald for himself, his heirs and assigns, by the acceptance of this conveyance hereby agrees to construct two good crossings, etc.—this conveyance is delivered by the first party and accepted by the second party upon the express agreement that in case the said Foote, his heirs and assigns shall hereafter purchase any part of said land on the terms of said option for any other purpose than for the use and benefit of the said Fitz Gerald, his heirs and assigns, the said Finley will in that case refund to the said Fitz Gerald a proportionate part of the consideration above corresponding to the portion of said land hereby conveyed which shall be so purchased by him.

No. 6.

Joseph D. Antrim and Wife
to
Gerald Purcell Fitz Gerald.

Deed.

Dated June 6, 1900.
Recorded June 13, 1900.
Deed Book 184, page 33.
Consideration, $2,000.00.

Conveys right-of-way for the location construction and maintenance of a railroad as the same has been finally located and determined by the party of the second part 60 ft. in width over,
38 through and across that certain tract of land in Menallen tp. bounded by lands of S. E. Finley, John Antrim, George Hess

and others, being the residence property of said Joseph D. Antrim, the grantor, which right-of-way is described as follows: Beginning at stone on division line of Joseph D. Antrim and George W. Hess, thence N. 51 deg. 57′ W. 20.7 ft. to corner common to Joseph D. Antrim, George W. Hess and Naomi Dearth, thence to a corner N. 37 deg. 51′ E. 156 ft. along division line of Joseph D. Antrim and Naomi Dearth, thence N. 10 deg. 11′ E. 60.9 ft. along said division line, thence parallel to and 30 ft. distant from center line of Hackney Branch of S. W. P. R. R. N. 39 deg. 41′ E. 292 ft., thence by curve to right with radius of 740 ft. a distance of 1211.2 ft. thence 47 deg. 19′ E. 467.3 ft., thence by curve to left with radius of 1403 ft. a distance of 417.4 ft., thence as in four preceding courses parallel to and 30 ft. distant from center line of said Railroad, S. 64 deg 22′ E. 398 ft. to point *off* the division line between Joseph D. Antrim and S. E. Finley, thence along said division line S. 44 deg. 8′ W. 31.6 ft. to center line of said railroad, thence by same course 31.6 ft. further, thence parallel to and 30 ft. distant from the center line of said railroad, N. 64 deg. 22′ W. 378 ft., thence by a curve to the right with a radius of 1463 ft. a distan*t*- of 435.2 ft., thence N. 47 deg. 19′ W. 467.3 ft. thence by curve to left with a radius of 687 ft. a distan*t*- of 1118.8 ft., thence as in four preceding courses parallel to and 30 ft. distant from the center line of said railroad S. 39 deg. 41′ W. 499.3 ft. to point in division line between Joseph D. Antrim and George W. Hess, thence by said division line N. 70 deg. 57′ W. 4.5 ft. to stone place of beginning, containing 3.922 acres.—And the said parties of the first part hereby release unto the said party of the second part, his heirs and assigns, and any party or company operating said railroad, any and all damages accruing to the parties of the first part by reason of the location, construction and maintenance of the said railroad through the lands upon the right-of-way aforesaid.

No. 7.

John L. Sapper et al.
to
Gerald Purcell Fitz Gerald.

Deed.

Dated September 23, 1902.
Recorded January 7, 1903.
Deed Book 207, page 236.
Consideration, $136,138.75.

Conveys tract of land in the Menallen tp., bounded by land of Central Connellsville Coke Co., J. Johnson, other land of said John L. Sapper, Fayette Coke Co. and Mrs. Ben Williams; beginning at limestone corner of lands of Mrs. Ben Williams and 39
Central Connellsville Coke Co., thence by and along the latter S. 52 deg. 50′ E. 1053.9 ft. to stone, S. 65 deg. 17′ W. 576.2 ft. to

Walnut, S. 77 deg. 42′ W. 368.6 ft. and by land of J. Johnson S. 24 deg. 18′ E. 2040 ft. and John L. Sapper S. 69 deg. 7′ W. 301.1 ft., N. 75 deg. 12′ W. 350.3 ft., N. 66 deg. 64′ W. 226.8 ft., S. 10 deg. 53′ W. 206.5 ft., S. 1 deg. 13′ E. 792 ft., S. 32′ E. 153.3 ft., S. 28 deg. 19′ W. 74.8 ft., S. 48 deg. 49′ W. 477.6 ft., S. 53 deg. 23′ W. 243.3 ft. to stone on line of Fayette Coke Co. and by Fayette Coke Co. N. 15 deg. 15′ W. 1347.9 ft., N. 45 deg. 40′ W. 883.7 ft., N. 25 deg. 27′ E. 1074 ft., N. 45 deg. E. 867.6 ft. and by Mrs. Ben Williams N. 67 deg. 14′ E. 721.3 ft., N. 7 deg. 3′ W. 656.3 ft. to beginning, containing 108.911 acres.

No. 8.

George W. Hess and Wife
to
Gerald P. Fitz Gerald.

Right of Way Deed.

Dated June 2, 1900.
Recorded June 6, 1900.
Deed Book 179, page 496.
Consideration, $1,000.

Conveys right of way over tract of land in German tp.: beginning in division line of Hess and Joseph D. Antrim, thence by division line S. 70 deg. 57′ E. 4.5 ft. thence parallel and 30 ft. distant from center line of Hackney Branch of S. W. P. R. R. S. 39 deg. 41′ W. 423.1 ft., thence by curve to left parallel with said center line, with radius of 1012 ft., a distance of 1046.6 ft. to north side of G. W. Hess land and land occupied by Masontown & New Salem R. R. Co. for right of way, thence by said line by curve to the left with radius of 1940 ft., a distance of 183 ft. to center line of Hackney Branch of S. W. P. R. R., thence by same curve and radius a further distance of 88.3 ft., thence by curve to right with radius of 1072 ft. parallel to and 30 ft. distant from center line of Hackney Branch, a distance of 834.5 ft., thence parallel to and 30 ft. distant from center line, N. 39 deg. 41′ E. 220.5 ft. to division line of Hess and Naomi Dearth, thence by division line S. 51 deg. 57′ E. 30 ft. to center line of Hackney Branch; thence by same line and course a further distance of 25.7 ft. to beginning, containing 1.817 acres. Together with the mining rights, liberties and privileges in deed from George W. Hess and wife to Charles H. Foote, dated July 20, 1899, Deed Book 170, page 231. It is expressly understood that the strip of land herein conveyed is for railroad right of way and is not in fee simple, and in case said strip of land is abandoned by disuser for a period of one year at any time as a railroad, it shall immediately on the expiration of one year revert to said George W. Hess, his heirs and assigns.

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No. 9.

Gerald Purcell Fitz Gerald and Lida E. N., His Wife,
to
Charles E. Lenhart.

Deed.

Dated June 13, 1903.
Recorded July 9, 1903.
Deed Book 213, page 437.
Consideration, $50,000.

And in further consideration of covenants to be kept and performed by the said party of the second part as herein contained and set forth, and in consideration of the covenants contained in a certain agreement in writing between the said Gerald Purcell Fitz Gerald and the said Charles E. Lenhart of even date herewith and to be recorded—Conveys all the undnivided one-tenth of those parcels of land situate in Fayette County, Penna., to wit: (Here follows the first described tract hereinabove conveyed to Fitz Gerald by said deed of Jacob S. Hackney and wife; also Edgar S. Hackney tract third above described; also Rockwell tract fourth above described; also Isabella Hackney tract second above described; also John Sapper, et al. tract seventh above described.)—Including all the Coke ovens, pumps, tipples, haulage appliances, shafts, slopes, tracks, pit wagons, railroad sidings, switches, cars, and all the implements, appliances and equipments used in and about those certain coal mines, and coke ovens known as The Fayette Coke Co.—(Next follows the undivided one-tenth interest in the three railroad rights-of-way conveyed by Hess eighth above described; and by S. E. Finley fifth above described, and by Joseph D. Antrim sixth above described.)—It is distinctly understood by and between the parties hereto that the interest hereby conveyed in said rights-of-way is subject to all exceptions, reservations and covenants contained in said deeds for the same to the said Gerald Purcell Fitz Gerald, and the said Charles E. Lenhart by the acceptance of this deed assumes and agrees to be liable in proportion to his interest in said rights-of-way for the performance of the covenants entered into by the said Fitz Gerald when he accepted said deeds for said rights-of-way, which covenants are particularly specified in said deeds.

No. 10.

Connellsville Central Coke Co.
to
Gerald Purcell Fitz Gerald and Charles E. Lenhart.

Deed.

Dated December 20, 1907.
Recorded January 14, 1908.
Deed Book 281, page 139.
Consideration $1.00 etc.

Conveys all the coal of the nine foot or Connellsville vein of coal
underlying two parcels of land in Menallen tp.; First: beginning at
stake corner to land of second parties formerly the John Sapper tract,
thence by Sapper tract N. 86 deg. 15′ W. 92.05 ft. and by
41 other lands of second parties formerly Hackney tract N. 58
deg. 8′ W. 218 ft., thence by the Williams tract of which
this piece is a part N. 51 deg. 2′ E. 320.12 ft. to stake in lane of
Sapper tract, thence by Sapper tract S. 4 deg. 59′ E. 323.64 ft. to
beginning, containing 1.095 acres;

Second. Beginning at stake at side of public road at line of second parties formerly Hackney tract, thence by public road and Hackney tract S. 83 deg. 30′ E. 290.71 ft. to corner of Williams tract of which this is a part, thence by Williams tract S. 43 deg. 23′ W. 448.92 ft. to Hackney line, by Hackney tract N. 58 deg. 8′ W. 101 ft., by same N. 19 deg. E. 323.44 ft. to beginning, containing 1.564 acres. Together with the right to mine and remove every part of said coal under the tracts aforesaid and without being required to provide for the overlying strata or surface and without being liable for any injury to the same or to anything therein or thereon by reason thereof, and with all reasonable privileges for ventilating, pumping and draining the mines, and the right to keep and maintain roads and ways in and through said mines forever for the transportation of the said coal, etc., and to coal materials and other things from and to other lands.

And the said Fitz Gerald and Lenhart conveyed out of said properties several parcels thereof by these instruments of record in said Recorder's office of Fayette County, viz:

No. 1.

Gerald Purcell Fitz Gerald and Lida Niccolls, His Wife, by R. W. Playford and A. H. Reeder, Attorneys-in-Fact,
to
South West Penna. R. R. Co.

Deed.

Dated August 8, 1900.
Recorded, March 29, 1906.
Deed Book 244, page 271.
Consideration, $1.00, etc.

Conveys: 1st, 1.817 acres of George W. Hess tract, excepting the nine foot vein of coal and mining rights; being the right-of-way eighth above described; 2nd, 0.135 of an acre, subject to prior sale of coal; 3rd, 3.022 acres, being the Antrim right-of-way sixth above described; 4th, 3.709 acres, excepting coal and mining rights; 5th, 4.228 acres.

No. 2.

42 Gerald Purcell Fitz Gerald and Charles E. Lenhart and Carrie, His Wife,
to
School District of Menallen Tp.

Deed.

Dated August 1, 1905.
Recorded July 24, 1906.
Deed Book 256, page 420.

Conveys 15,000 sq. ft. of land in Menallen tp. on south side of road leading from New Salem to Uniontown. To revert if used for other than school purposes.

No. 3.

Gerald Fitz Gerald and Mabel Marie Purcell, His Wife, and Charles E. Lenhart and Carrie, His Wife,
to
Connellsville Central Coke Co.

Deed.

Dated November 6, 1907.
Recorded January 14, 1908.
Deed Book 278, page 48.

Conveys all the nine foot or Connellsville vein of coal under three parcels of land in Menallen tp.:

1st. Containing 1.049 acres; part of John Sapper tract;
2d. Containing 0.117 acres; part of Hackney tract;
3d. Containing 0.687 acres; part of Rockwell tract; together with mining and other rights.

No. 4.

Fayette Coke Company
to
The Trotter Water Co.

Right of Way Deed.

April 22, 1907.
Recorded July 26, 1907.
Deed Book 273, page 289.
Consideration $303.75.

Conveys right of way to lay, maintain and operate a pipe line for transportation of water, oil and gas through and across the premises of the first party in Menallen tp.

No. 5.

Gerald Purcell Fitz Gerald and Mabel Marie Purcell, His Wife, and Charles E. Lenhart and Carrie, His Wife,
to
Penna. R. R. Company.

Deed.

Dated May 25, 1908.
Recorded June 10, 1908.
Deed Book 281, page 333.

43 Conveys 0.114 of an acre, being part of the Jacob Hackney tract.

Paragraph X.

Said Shamrock Supply Company is a partnership, operating a general merchandizing store, at and in connection with the coke works of said Fayette Coke Company, in a building on the land of said defendants Fitz Gerald and Lenhart. The value of the stock handled annually by said Supply Company is approximately $50,000, and the gross profits are approximately $10,000, annually, with net profits annually of about $7,000, increasing considerably when said coke works are in full operation.

Paragraph XI.

The fair market value of the said properties of the Fayette Coke Company, owned by the defendants Fitz Gerald and Lenhart in the proportions aforesaid, is at least $1,000,000; and the operation of their coke works shows gross sales of coke and coal annually as follows:

Of Coke, approximately, $250,000 worth of Coal,

Rents and farm products, 8,000, approximately.

And the cost of mining said coal and making said coke and operating said farms (without any sinking fund allowance) is approximately $160,000 annually; leaving a net difference for profit on operation, of, at this time, about $90,000, which is much increased when the coke works and store are in full operation and the price of coke is at the average price of good and bad times.

Paragraph XII.

44 An Act of Parliament dissolving the marriage between the said Gerald and the said Lida Eleanor was duly passed subsequent to December 6, 1906; and thereafter, pursuant to the provisions of the aforesaid agreement of December 6, 1906, the profits from the operation of said Fayette Coke Company and said Shamrock Supply Company have been until the date hereinafter mentioned, distributed by the defendant Charles E. Lenhart as manager thereof, according to the provisions of said agreement and according to the rights of the various parties interested under said agreement, a proper proportion thereof, having been annually and regularly paid to said trustees for the benefit of said plaintiff Lida Eleanor Purcell Fitz Gerald, and another portion thereof paid to said trustees toward the accumulation of the $300,000 fund held for the children of said Gerald Purcell Fitz Gerald and Lida Eleanor Purcell Fitz Gerald, and for said plaintiff Lida Eleanor Purcell Fitz Gerald, and the balance thereof paid to said defendants Fitz Gerald and Lenhart as partners and owners in their said proportions of nine-tenths and one-tenth respectively, up to June 30, 1910, at which time there was a regular payment due to the trustees for each of said two purposes or funds, but said payment was not then nor at any time since nor before paid, but has been withheld, and said defendant Lenhart, as manager of said properties, has failed and refused to pay the same to said trustees, and has notified said trustees that he will not pay the same, alleging that he has been so instructed by said defendant Gearld Purcell Fitz eGrald, his partner and co-trustee. And your orator Josiah V. Thompson has received the following communication from the defendant Lenhart on the subject, to wit:

45 "NEW SALEM, PA., *June* 23, 1910.

J. V. Thompson, C. E. Lenhart, G. P. Fitz Gerald, Trustees for Lida E. Fitz Gerald, John Fitz Gerald, Edward Fitz Gerald, Gerald Fitz Gerald:

You are hereby notified that G. P. Fitz Gerald has instructed me, as his business manager, not to pay to the trustees, Alimony or to Children's Fund, amounts due June 30th, 1910.

C. E. LENHART,
Business Manager.

Copy to J. V. Thompson, C. E. Lenhart and G. P. Fitz Gerald."

And your orators aver, that said defendant Gerald P. Fitz Gerald, his co-trustee, did, in writing, instruct said defendant Lenhart, as his business manager at said coke works and said store, to refuse to pay either said wife's allowance or to said children's and wife's fund coming due June 30, 1910; further averring, that said defendant Gerald Purcell Fitz Gerald, by his attorney and counselor at law, specifically notified said defendant Lenhart not to make any payment whatsoever to said Lida Eleanor Purcell Fitz Gerald, or for or on her account, from or out of any funds belonging to said defendant Gerald Purcell Fitz Gerald, or from or out of any funds of his or property over which he has any connection or control, in or relating to said Coke Company or any other company which the said Lenhart may manage for the said defendant Fitz Gerald, and this on or about June 23, 1910.

Up to said June 30, 1910, the trustees had received, pursuant to the terms of the aforesaid agreement, the sum of $22,000 on account of the fund of $300,000 directed to be accumulated by them, and said trustees still hold said funds and have invested the same pursuant to the directions of the aforesaid agreement.

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Paragraph XIII.

Your orators further aver, that the defendant Gerald Purcell Fitz Gerald has violated his trust in that he has forbidden the defendant Lenhart, his manager of the above-named properties, to pay over any part of the profits therefrom to the said trustees for the purpose recited in said agreement of December 6, 1906, and in that he has thus made it impossible for said trustees to receive or pay over to the parties entitled thereto the sums contemplated and set apart by the terms of said agreement, and in that the defendant Fitz Gerald, as your orators are informed and believe, has wholly repudiated the aforesaid agreement and declared the same not binding on him, and in that he refuses, as one of said trustees, to receive, apply or pay over any part of the said income and trust fund provided for in said agreement, and thereby prevents the due execution of the said trusts, and in that he refuses to act as in duty bound by the terms of said agreement, and refuses to perform his duties as prescribed in said trust instrument. The defendant Fitz Gerald, by reason of the matters aforesaid, and of the antagonism between his interests as an individual and his duties as trustee, is a wholly unfit person to continue to act as trustee under the aforesaid agreement.

Paragraph XIV.

Your orators further aver, that the defendant Lenhart has violated his aforesaid trust, in that he has unquestioningly obeyed the direction of the defendant Fitz Gerald to withhold from the aforesaid trustees all sums due and payable to them by virtue of the aforesaid agreement of December 6, 1906, and has wholly failed and neglected to perform his duties as trustee since
47 the aforesaid direction of the defendant Fitz Gerald, and has
neglected and refused to exercise any independent judgment

in the premises, as is incumbent upon him as trustee; and said defendant Lenhart is entirely subject to the domination and control of the defendant Fitz Gerald, and by reason thereof and of his failure and refusal to perform his duties as trustee, and by reason of his antagonistic personal interests as partner of the defendant Fitz Gerald and as manager of the copartnership properties, is an unfit person to continue to act as trustee under the aforesaid agreement.

Prayer for Relief.

Wherefore, your orators need equitable relief, and pray this Honorable Court, having jurisdiction under the law, as well as by the express terms of the aforesaid recited instrument, over the parties thereto and to be affected thereby, and having jurisdiction over the said properties, all of which are situate within said County:

1. To remove the defendants Fitz Gerald and Lenhart from their respective offices of trustee under the aforesaid agreement, and to permit the vacancies to be filled by the plaintiff Josiah V. Thompson, or that said vacancies be filled by appointment by the Court, as trustees, of two proper persons.

2. To declare and establish a lien upon the properties of the copartnership known as Fayette Coke Company and Shamrock Supply Company, for the benefit of the beneficiaries under the aforesaid agreement of December 6, 1906, as contemplated and provided therein, to secure the payment of the sums by said agreement provided to be paid.

48 3. To construe the trust agreement and establish the rights of the trustees and the rights and interests of the beneficiaries thereunder, and to instruct the trustees accordingly.

4. To require the defendants Fitz Gerald and Lenhart as members of the aforesaid copartnerships, to account for and pay over to the trustees now in office and the other trustees to be appointed, or to a sequestrator or receiver to be appointed herein, the proportion of the profits of the Fayette Coke Company and the Shamrock Supply Company provided by the aforesaid agreement of December 6, 1906, to be paid over to the trustees, and for such subsequent accountings as may be necessary during the term of the aforesaid agreement.

5. To appoint, pending this suit and the appointment of new trustees, a sequestrator or receiver, to whom the defendants Fitz Gerald and Lenhart shall, within thirty days from the order of the Court in this case, render an account of the earnings and profits of said properties of the Fayette Coke Company and the Shamrock Supply Company for the nine months ending September 30, 1910, and thereupon pay over to the said sequestrator or receiver nine-tenths of said profits, and to whom the said defendants Fitz Gerald and Lenhart shall, from time to time thereafter, as this honorable Court may direct, render account of the earnings and profits of said properties, and thereupon pay nine-tenths of said profits to said sequestrator or receiver; said amount so paid to said sequestrator or receiver to be

thereafter paid out from time to time to the parties thereto entitled, under the direction of this Court.

49 6. To restrain, by its injunction, both pendente lite and permanent, the defendants Fitz Gerald and Lenhart, or either of them, and their or either of their agents, attorneys and servants, from in any wise alienating or encumbering any of the properties of the aforesaid copartnerships, to the prejudice of the trustees or beneficiaries under the aforesaid agreement of December 6, 1906.

7. For general relief.

HOWELL, STURGIS & MORROW,
GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Plaintiffs.

SAML. UNTERMYER,
Of Counsel.

PENNSYLVANIA,
Fayette County, ss:

Josiah V. Thompson, being duly sworn, says that the aforegoing statements are correct and true, as he verily believes.

JOSIAH V. THOMPSON.

Sworn to and subscribed this 26 day of October, 1910.

CHARLES T. CRAMER,
[SEAL.] *Notary Public.*

My Commission Expires Jan. 19, 1911.

Endorsement.

In the Court of Common Pleas of Fayette County, Pennsylvania.

No. 618. In Equity.

Between

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the Trusts Within Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Plaintiffs,

50 and

Gerald Purcell Fitz Gerald, Individually and as Trustee of the Trusts Within Described; Charles E. Lenhart, as Trustee of the Trusts Within Described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company, and Shamrock Supply Company, Defendants.

Bill of Complaint.

To Gerald Purcell Fitz Gerald, individually and as Trustee of the trusts within described; Charles E. Lenhart, as Trustee of the trusts within described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company:

You are hereby notified and required, within fifteen days after service hereof on you, to cause an appearance to be entered for you in the Court of Common Pleas of Fayette County, Pennsylvania, sitting in Equity, and to file your answer within thirty days to the within Bill of complaint of the within named Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the trusts within described; Lida Eleanor Purcell Fitz Gerald; John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, infants, by William McClelland, and their Guardian ad Litem, and to observe what the said Court shall direct.

You are also notified that if you fail to comply with the above directions by not entering an appearance in the Prothonotary's office within fifteen days, and not filing an answer within thirty days, you will be liable to have the bill taken pro confesso, and a decree made against you in your absence.

Witness our hands at Uniontown, Pennsylvania, this 26 day of October, A. D., 1910.

HOWELL, STURGIS & MORROW,
Solicitors for Plaintiffs, 59 East Main Street, Uniontown, Pennsylvania.
GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Plaintiffs, 37 Wall Street, Manhattan, New York City, New York.

Printer's charges $61.20. Filed Oct. 27, 1910 (142.)

51 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. —.

Between

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the Trusts, &c.; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

Gerald Purcell Fitz Gerald, Individually and as Trustee, &c.; Charles E. Lenhart as Trustee, &c.; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

To the Honorable the Judges of said Court:

The petition of Lida Eleanor Purcell Fitz Gerald respectfully represents, that she and Josiah V. Thompson and the other plaintiffs above named, are filing herewith against the defendants above named their Bill, and that the plaintiffs John Purcell Fitz Gerald and Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald are infants under the age of fourteen years, and are the children of your petitioner and the defendant Gerald Purcell Fitz Gerald; that they are wards of the High Court of Chancery of England and are required to reside in England or Ireland during a portion of each year; that the defendant Gerald Purcell Fitz Gerald is a resident of the island of Waterford, Ireland, and is a subject of the United Kingdom of Great Britain and Ireland.

Your petitioner further represents that the said infants above named have a substantial interest in the matters set forth in said Bill adverse to the interest of their said father, and that 52 it is necessary that your Honorable Court should appoint a guardian ad litem for said infants, to the end that their interests in the matters in controversy may be properly presented and protected.

Your petitioner therefore prays the Court to appoint William McClelland Esq., Prothonotary of said Court as guardian ad litem for the said infants. And she will ever pray &c. And being duly sworn according to law says that the statements contained in the foregoing petition are true as she verily believes.

LIDA ELEANOR PURCELL FITZ GERALD.

Subscribed and sworn to before me this 27th day of October 1910.

CHARLES T. CRAMER,
[SEAL.] *Notary Public.*

My Commission Expires Jan. 19, 1911.

Order.

Now October 27 1910, petition of Lida Eleanor Purcell Fitz Gerald praying the appointment of William McClelland as guardian ad litem for John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, infant plaintiffs in the above styled case, presented to Court, and upon consideration thereof the appointment is made as prayed for.

Per Curiam:

R. E. UMBEL, *P. J.*

Attest:

WM. McCLELLAND,
Prothonotary.

Endorsement: Equity, No. 618. Between Josiah V. Thompson, trustee, Lida E. P. Fitz Gerald et al. and Gerald P. Fitz Gerald, Charles E. Lenhart, et al. Petition for appointment of guardian ad litem. (Order inside Filed Oct. 27" 1910—Guggenheimer, Untermyer & Marshall No. 37 Wall St. New York, N. Y. Howell, Sturgis and Morrow, Attorneys and Counselors at Law, Uniontown, Penna.

53 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. —.

Between

JOSIAH V. THOMPSON, as Trustee for LIDA ELEANOR PURCELL FITZ Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the Trusts Hereinafter Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee, of the Trusts Hereinafter Described; Charles E. Lenhart, as Trustee of the Trusts Hereinafter Described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

Petition for Appointment of Sequestrator or Receiver.

To the Honorable the Judges of said Court:

The petition of Josiah V. Thompson, as Trustee, etc., for himself and associate plaintiffs, respectfully represents as follows:

I. The above named plaintiffs have this day filed in this Court, at the above number, a bill of complaint, a copy of which is attached hereto and made a part of this petition:

II. The prayer of said bill is, among other things, for the removal of Gerald Purcell Fitz Gerald and Charles E. Lenhart, as Trustees of the trusts therein recited, and for an accounting of profits, to which bill answer is required within thirty days;

54 III. Pending the answer of said defendants and the action of this Court, there are large interests involved in the manufacturing business of the Fayette Coke Company and the Shamrock Supply Company owned by said Fitz Gerald and Lenhart in the profits of which the plaintiffs are largely interested and which they desire to have secured.

Wherefore, petitioner prays the Court, pending final action on said bill, to appoint a sequestrator or receiver and that Lenhart, as manager, account for nine-tenths of the rents, issues and profits of said Fayette Coke Company and Shamrock Supply Company, being the interest therein of said Gerald Purcell Fitz Gerald; said officer of the Court to receive and receipt for and disburse the same as this Court shall hereafter direct.

JOSIAH V. THOMPSON,
Petitioner.

PENNSYLVANIA,
Fayette County, ss:

Josiah V. Thompson, being duly sworn, says that the above statements are correct and true, as he verily believes.

JOSIAH V. THOMPSON.

Sworn to and Subscribed this 26 day of October, 1910.

CHARLES T. CRAMER, [SEAL.]
Notary Public.

My Commission Expires Jan. 19, 1911.

Endorsement: Equity No. 618—Between Josiah V. Thompson, trustee, Lida E. P. Fitz Gerald et al. and Gerald P. Fitz Gerald and Charles E. Lenhart, et al.—Petition for appointment of sequestrator or receiver—Filed Oct. 27" 1910—Guggenheimer, Untermyer & Marshall No. 37 Wall St. New York, N. Y.—Howell, Sturgis and Morrow, Attorneys and Counselors At Law,—Uniontown, Penna.

55 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. —.

Between

JOSIAH V. THOMPSON, as Trustee for LIDA ELEANOR PURCELL FITZ Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the Trusts Hereinafter Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee of the Trusts Hereinafter Described; Charles E. Lenhart, as Trustee of the Trusts Hereinafter Described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

Order of Court.

On October 27, 1910, petition herein presented, and upon consideration thereof the Court directs a citation to issue upon said Gerald Purcell Fitz Gerald and Charles E. Lenhart to show cause why the prayer of the petitioner should not be granted, returnable in ten days; service to be made upon Lenhart as attorney in fact specially empowered by Gerald Purcell Fitz Gerald by letter of attorney dated June 19, 1909, recorded July 3, 1909, in Recorder's office of Fayette County, Pennsylvania, in Agreement Book 22, page 33, wherein, amongst other things, said Fitz Gerald did provide as follows:

"And I also authorize my said attorney to appear for me in any court of justice to any action or other proceeding which may be instituted against me or whereunto I shall be a party, and to 56 defend the same or suffer judgment to be had or given against me in any such action or proceeding by default or otherwise, as he, my said attorney, shall be advised or thinks proper."

Returnable in ten days.

By the Court.

R. E. UMBEL, *P. J.*

Attest:

WM. McCLELLAND, *Proth'y.*

Endorsement: Equity, No. 618—Between Josiah V. Thompson, trustee, Lida E. P. Fitz Gerald et al. and Gerald P. Fitz Gerald, Charles E. Lenhart, et al.—Order of Court directing Citation to issue—Filed Oct. 27", 1910. Guggenheimer, Untermyer & Marshall No. 37 Wall St. New York, N. Y. Howell, Sturgis and Morrow, Attorneys and Counselors At Law, Uniontown, Penna.

57 In the Court of Common Pleas of Fayette Co.

No. 618. In Equity.

Josiah V. Thompson, Trustee, etc., et al.
vs.
Gerald Purcell Fitz Gerald et al.

Now, November 3d, 1910, upon application on behalf of the defendant, Gerald Purcell Fitz Gerald, it is ordered and decreed that an extension of ten days be granted to the defendants upon the order heretofore made October 27, 1910.

Per Curiam:

R. E. UMBEL, *P. J.*

Attest:

WM. McCLELLAND, *Proth'y.*

Endorsement: No. 618. In Equity—Josiah V. Thompson, Trustee, etc., et al. vs. Gerald Purcell Fitz Gerald et al.—Order—Filed Nov. 3, 1910.

58 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618, —— Term.

Josiah V. Thompson, as Trustees, &c., et al.
vs.
Gerald Purcell Fitz Gerald, Individually, &c., et al.

And now November 11, 1910 comes the above named defendant, Gerald Purcell Fitz Gerald by his undersigned Attorney and appears in the said action de bene esse for the sole purpose of making a motion to set aside the service of the Bill In Equity in the said case.

ROBINSON, McKEAN & MARTIN,
MICHAEL J. RYAN,
JAMES GAY GORDON,
WILLIAM A. STONE,
Attorneys for Gerald Purcell Fitz Gerald.

Endorsement: No. 618—In the Court of Common Pleas of Fayette County—Sitting in Equity—Thompson et al. v. Fitz Gerald—Appearance de bene esse—Filed Nov. 11, 1910.

59 COMMONWEALTH OF PENNSYLVANIA,
County of Fayette, ss:

In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting — Equity.

No. 618.

JOSIAH V. THOMPSON, &c., et al.,
vs.
GERALD PURCELL FITZ GERALD, &c., et al.

Appearance.

Now Nov. 11, 1910, enter our appearance de bene esse for Charles E. Lenhart individually in above styled case.

JOHNSON & RUSH,
Atty's for Charles E. Lenhart.

To William McClelland, Prothonotary.

Endorsement: No. 618 in Equity—Josiah V. Thompson, Trustee, &c., et al. vs. Gerald Purcell Fitz Gerald, &c., et al.—Præcipe for Appearance—Filed Nov. 11, 1910.

60 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618, —— Term.

JOSIAH V. THOMPSON, as Trustee, &c., et al.
vs.
GERALD PURCELL FITZ GERALD, Individually, &c., et al.

And now November 11, 1910 the defendant, Gerald Purcell Fitz Gerald by his attorneys moves the Court to set aside the service of the said bill upon him for the following reasons:

First—Because it appears of record that the said bill was not served upon him personally and that he is a non-resident of this Commonwealth.

Second—Because it appears of record that the said bill was served upon Charles E. Lenhart, as "attorney in fact" for this defendant.

Third—Because the service of the said defendant is not according to law.

ROBINSON, McKEAN & MARTIN,
MICHAEL J. RYAN,
JAMES GAY GORDON,
WILLIAM A. STONE,
Attorneys for Gerald Purcell Fitz Gerald.

Endorsement: No. 618—In the Court of Common Pleas of Fayette County—Sitting in Equity—Thompson et al. v. Fitz Gerald—Motion to set aside service—Now Nov. 11, 1910 the within motion presented and ordered to be filed and placed on the argument list.—By the Court, R. E. Umbel, P. J.—Filed Nov. 11, 1910.

61 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

Between

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald of the Trusts, &c.; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

Gerald Purcell Fitz Gerald, Individually and as Trustee, &c.; Charles E. Lenhart, as Trustee, &c.; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Co. and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

The Commonwealth of Pennsylvania to Gerald Purcell Fitz Gerald and Charles E. Lenhart, Greeting:

On petition of Josiah V. Thompson as trustee for himself and associate plaintiffs above named, setting forth that the above named plaintiffs have filed their Bill in this Court praying, among other things, for the removal of Gerald Purcell Fitz Gerald and Charles E. Lenhart as trustees of the trusts therein recited and for an accounting of profits, to which Bill answer is required within thirty days; and that pending said answer and action of the Court there are large interests involved in the manufacturing business of the Fayette Coke Company and the Shamrock Supply Company owned by said Fitz Gerald and Lenhart, in the profits of which the plaintiffs are largely interested and which they desire to have secured, and praying the Court, pending final action on said Bill to appoint a sequestrator or receiver, and that Lenhart as manager, account for

nine-tenths of the rents, issues and profits of said Fayette Coke Company and Shamrock Supply Company, being the interest therein of said Gerald Purcell Fitz Gerald; said officer of the
62 Court to receive and receipt for and disburse the same as this Court shall hereafter direct.

Upon the filing of which petition the Court made the following order:

Order of Court.

October 27, 1910, petition herein presented, and upon consideration thereof the Court directs a citation to issue upon said Gerald Purcell Fitz Gerald and Charles E. Lenhart to show cause why the prayer of the petitioner should not be granted, returnable in ten days; service to be made upon Lenhart as attorney in fact, specially empowered by Gerald Purcell Fitz Gerald by letter of attorney dated June 19, 1909, recorded July 3, 1909, in Recorder's Office of Fayette County, Pennsylvania, in Agreement Book 22 page 33 wherein, amongst other things, said Fitz Gerald did provide as follows:

"And I also authorize my said attorney to appear for me in any Court of Justice to any action or other proceeding which may be instituted against me or whereunto I shall be a party and to defend the same or suffer judgment to be had or given against me in any such action or proceeding by default or otherwise, as he, my said attorney, shall be advised or thinks proper".

Returnable in ten days.

By the Court:

R. E. UMBEL, *P. J.*

You are therefore required to appear within ten days from the service hereof upon you and show cause, if any you have, why a sequestrator or receiver should not be appointed as prayed for.

Witness my hand and the seal of said Court this 27th day of October A. D. 1910.

[SEAL.]

WM. McCLELLAND,
Prothonotary.

Endorsement: No. 618. In Equity—Josiah V. Thompson, Trustee, Lida E. P. Fitz Gerald et al. &c., and Gerald P. Fitz Gerald, Charles E. Lenhart, et al. &c.—Citation—Filed Nov. 14, 1910—Wm. McClelland, Prothonotary, Clerk of the Court of Quarter Sessions and Oyer and Terminer—Fayette County—Uniontown, Pa.

63 Oct. 28, 1910, Served this writ on the within-named Gerald Purcell Fitz Gerald, individually and as trustee, &c., Charles E. Lenhart, trustee, &c., Gerald Purcell Fitz Gerald and Charles E. Lenhart, partners as Fayette Coke Co., and Shamrock Supply Company; Charles E. Lenhart, manager of Fayette Coke Co., and Shamrock Supply Co., defendant- by handing a true and attested copy hereof, to Charles E. Lenhart, personally, (and by

making known to him the contents thereof) together with a copy of plaintiff's bill.

Sheriff's costs $4.50.

So answers &c.

PETER A. JOHNS, *Sh'ff.*

Endorsement: Received Sheriff's Office, Fayette County, Pa.—Oct 27, 4.43 P. M., 1910—Peter A. Johns, Sheriff.

64 In the Court of Common Pleas of Fayette County, Pa., Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON, Trustee, et al.,
vs.
GERALD PURCELL FITZ GERALD et al.

And now, November 15, 1910, it is agreed by and between Howell, Sturgis & Morrow, attorneys for the plaintiffs in above styled suit, and Robinson, McKean & Martin, of counsel for the defendants, that the time for the filing of an answer to the bill in this case and for the filing of an answer to the rule to show cause why a sequestrator or receiver should not be appointed, granted Oct. 27, 1910, be extended until Dec. 1, 1910.

It is further agreed that the motion to set aside the service of the Bill of Complaint on Gerald Purcell Fitz Gerald be withdrawn and that a general appearance be entered for him.

HOWELL, STURGIS & MORROW,
Att'ys for Pl'ffs.
ROBINSON, McKEAN & MARTIN,
Att'ys for Def't-.

Endorsement: No. 618. In Equity—Josiah V. Thompson, Trustee, et al. vs. Gerald Purcell Fitz Gerald et al.—Agreement of Counsel—Order: Now Nov. 15, 1910 the within stipulation presented & ordered filed and the Court fix Thursday Dec. 1, 1910 at 10 A. M. as the time for hearing on citation to show cause why a sequestrator or receiver should not be appointed. Per Curiam—Attest Wm. McClelland—Filed Nov. 15, 1910—Pro.

65 In the Court of Common Pleas of Fayette County, State of Pennsylvania, Sitting in Equity.

No. 618.

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald of the Trusts Within Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee *for* the Trusts Within Described; Charles E. Lenhart, as Trustee of Trusts Within Described; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company, and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

To the Honorable the Judges of the said Court:

The petition of the said Gerald Purcell Fitz Gerald, one of the defendants above named respectively represents:

66 That a Bill in Equity entitled as above set forth has been filed in your Honorable Court by the plaintiffs above named against your petitioner, one of the defendants above named, to No. 618, of which action the Circuit Court of the United States in and for the Western District of Pennsylvania has concurrent jurisdiction with your Honorable Court.

That the said plaintiff, Josiah V. Thompson is a citizen of the State of Pennsylvania, and a resident of the Western District thereof, and was such at the time of filing the said Bill.

That the plaintiff, Lida Eleanor Purcell Fitz Gerald, is averred in said Bill to be a resident of the State of Pennsylvania, having her domicil in the said Western District thereof.

That the plaintiff, William McClelland, appointed by your Honorable Court as guardian ad litem of the minor children named in the said Bill, is a citizen of the State of Pennsylvania, and a resident in the Western District thereof and was such at the time of bringing this action.

That the said defendant, your petitioner, at the time this suit was commenced was, and still is, as averred in said Bill, a resident of the Island, Waterford, Ireland, and is a subject of the King of the United Kingdom of Great Britain and Ireland, and is not now and was not at the time of filing the said Bill a resident of the State of Pennsylvania.

67 That the defendants, Charles E. Lenhart, Trustee named in said action and Charles E. Lenhart, partner named therein,

and Charles E. Lenhart, manager of Fayette Coke Company and Shamrock Supply Company named therein, are not active, necessary, indispensable, or substantially interested parties thereto. That this defendant your Petitioner is the only active, necessary, indispensable, substantially interested and principal defendant. That the matter in dispute as shown by said Bill is between the said Josiah V. Thompson, Trustee as aforesaid, the said Lida Eleanor Purcell Fitz Gerald and Charles E. Lenhart, Trustee as aforesaid, on the one side of said controversy and the said Gerald Purcell Fitz Gerald individually on the other. That the real and actual controversy is the right of the said aforementioned persons to collect from your Petitioner, the said Gerald Purcell Fitz Gerald, for the benefit of certain cestui que trustents, certain sums of money in accordance with a certain agreement set forth at length in said Bill (which agreement the said Gerald Purcell Fitz Gerald alleges to be wholly void) which right to collect said sums of money is affirmed by said Josiah V. Thompson and said Lida Eleanor Purcell Fitz Gerald and
68 denied by said Gerald Purcell Fitz Gerald, in which denial
said Charles E. Lenhart is only interested as co-trustee of said Josiah V. Thompson, and such interest, if any, is of like character with that of the said Josiah V. Thompson and contrary to the interests of said Gerald Purcell Fitz Gerald.

That said action is for a matter in dispute exceeding the sum of Two Thousand Dollars, exclusive of interest and costs.

That said defendant, your petitioner, desires to remove said Bill in Equity, suit, or action from your Honorable Court to the Circuit Court of the United States in and for the Western District of Pennsylvania, at Pittsburg, and that the time limited for such removal has not expired.

That the said defendant, your petitioner, has executed and presents herewith for filing, a bond with good and sufficient surety that he the said defendant will enter in said Circuit Court on the first day of its next session a copy of the record of such suit and for paying all costs that may be awarded by said Circuit Court, if such Court shall hold that such suit was wrongfully or improperly removed thereto and also that said defendant will appear and enter special bail in said suit, if special bail was originally re-
69 quisite therein.

Wherefore, your petitioner prays that this Honorable Court will accept this petition and bond, and proceed no further in said suit and that an order may be made by it transferring the said suit to the said Circuit Court of the United States for the Western District of Pennsylvania.

GERALD PURCELL FITZ GERALD.

UNITED STATES OF AMERICA,
Western District of Pennsylvania,
City of Uniontown, County of Fayette, ss:

Gerald Purcell Fitz Gerald, being duly sworn according to law, deposes and says that he is the principal defendant and under the proper arrangement of the parties the sole defendant named in the above entitled cause and the petitioner in the foregoing petition; that he has read the same and knows the contents thereof and that the statements therein set forth are true.

70 GERALD PURCELL FITZ GERALD.

Sworn to and subscribed before me this 28" day of Nov. A. D. 1910.

[SEAL.]

CHARLES T. CRAMER,
Notary Public.

My Commission Expires Jan. 19, 1911.

71 JOSIAH V. THOMPSON, Trustee, et al.
vs.
GERALD PURCELL FITZ GERALD et al.

Know all men by these presents, That Gerald Purcell Fitz Gerald, as principal, and George S. Harah, as suret*ies*, are held and firmly bound unto Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald; John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, Gerald Purcell Fitz Gerald, Lida Eleanor Fitz Gerald, William McClelland, Guardian ad item of John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, infants, plaintiffs in the above entitled cause, in the penal sum of Two Thousand Dollars ($2000.00), for which payment well and truly to be made unto the said above-named plaintiffs, their heirs, executors, administrators and assigns respectively, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Whereas the said Gerald Purcell Fitz Gerald having petitioned the Court of Common Pleas of Fayette County for the removal of a certain cause therein pending, wherein the said Josiah V. Thompson, a Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald; and Lida Eleanor Purcell Fitz Gerald; and John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, infants, by William McClelland, their guardian ad litem, are plaintffs, and the said Gerald Purcell Fitz Gerald, individually, and as trustee; Charles E. Lenhart as Trustee; Gerald Purcell Fitz Gerald and 72 Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager, Fayette Coke Company and Shamrock Supply Company, are defendants, to the Circuit Court of the United States for the Western District of Pennsylvania.

Now the condition of this obligation is such that if the said Gerald Purcell Fitz Gerald shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in the said suit, and shall well and truly pay all the costs that may be awarded by said Circuit Court of the United States, if said Circuit Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation to be void; otherwise to be in full force and virtue.

Witness our hands and seals this 28th day of November A. D. 1910.

GEARALD PURCELL FITZGERALD. [L. S.]
GEORGE S. HARAH. [L. S.]

STATE OF PENNSYLVANIA,
County of Fayette, ss:

On this 28th day of Nov. before me personally and severally appeared Gerald Purcell Fitz Gerald and George S. Harah, to me personally and severally known to be the individuals described in and who executed the foregong instrument, and who severally acknowledged to me that they executed the same.

J. S. ALTON,
Notary Public.

[SEAL.]

My Commission expires March 10th, 1913.

73 STATE OF PENNSYLVANIA,
County of Fayette, ss:

George S. Harah, being duly sworn, deposes and says that he is a resident and freeholder within the State of Pennsylvania, and is worth the sum of Two Thousand Dollars ($2000.00) over and above all debts and liabilities which he owes or has incurred, exclusive of the property exempt by law from levy and sale under an execution.

GEORGE S. HARAH.

Sworn to and subscribed before me this 28th day of Nov. A. D. 1910.

J. S. ALTON,
Notary Public.

[SEAL.]

My Commission expires March 10th, 1913.

STATE OF PENNSYLVANIA,
County of Fayette, ss:

—— ——, being duly sworn, deposes and says that he is a resident and freeholder within the State of Pennsylvania, and is worth the sum of — Dollars ($—), over and above all debts and liabilities which he owes or has incurred, exclusive of the property exempt by law from levy and sale under an execution.

—— ——.

Sworn to and subscribed before me this — day of —— A. D. 1910.

—— ——.

74 STATE OF PENNSYLVANIA,
County of Fayette, ss:

On this 28th day of Nov. 1910, before me personally appeared Gerald Purcell Fitz Gerald, to me known to be the individual described in and who executed the annexed instrument, as Principal, and duly acknowledged to me that he executed the same as and for his act and deed.

J. S. ALTON,
Notary Public.

[SEAL.]

My Commission expires March 10th, 1913.

Endorsement: No. 618. In the Court of Common Pleas of Fayette Co. In Equity. Josiah V. Thompson Trustee et al. vs. Gerald Purcell Fitz Gerald, et al. Petition for Removal Cause to U. S. Circuit Court, and Bond. Filed Nov. 28", 1910. Michael J. Ryan, William A. Stone, James Gay Gordon. Robinson, McKean & Martin, Attorneys at Law, Uniontown, Pa., Solicitors for Gerald Purcell Fitz Gerald.

75 In the Court of Common Pleas of Fayette County.

No. 618. In Equity.

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald of the Trusts Within Described; Lida Eleanor Purcell Fitz Gerald; John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian and Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee of the Trusts Within Described; Charles E. Lenhart, as Trustee of the Trusts Within Described; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

Order.

Now, November 30, 1910, this matter came on to be heard and was argued by counsel; and now, eo die, upon and after due consideration the order prayed for transferring the suit to the Circuit Court of the United States for the Western District of Pennsylvania is refused.

BY THE COURT.

Attest:

WM. McCLELLAND,
Prothonotary.

Endorsement: No. 618. In Equity. Josiah V. Thompson, etc., et al. vs. Gerald Purcell Fitz Gerald, etc., et al. Order. Filed Nov. 30, 1910.

76 Now Nov. 30″, 1910, the petitioner Gerald Purcell Fitz Gerald by his counsel excepts to the within order refusing to transfer the suit to the Circuit Court of the United States for the Western District of Pennsylvania and at his instance bill is sealed.

ROBERT E. UMBEL, *P. J.* [SEAL.]

77 In the Court of Common Pleas of Fayette County, Pa., Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON, Trustee, et al.
vs.
GERALD PURCELL FITZ GERALD, et al.

And now Nov. 30, 1910, on motion of H. L. Robinson of counsel for Gerald Purcell Fitzgerald, the hearing on the application for the appointment of a sequestratror or receiver in this case continued until Dec. 14, 1910, at 10 a. m. the present stipulation as to the filing of answers to Bill & Petition to continue in force.

PER CURIAM.

Attest:
WM. McCLELLAND, *Pro.*

Endorsement: No. 618. In Equity—Josiah V. Thompson et al. vs. Gerald Purcell Fitzgerald et al.—Order to continue hearing—Filed Nov. 30, 1910—R. McK. & M.

78 In the Court of Common Pleas of Fayette County, Pennsylvania.

In Equity. No. 618.

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the Trusts Within Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plain-

and

GERALD PURCELL FITZ GERALD, Individually and as Trustees for the Trusts Within Described; Charles E. Lenhart, as Trustee of the Trusts Within Described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company.

Separate Answer of Gerald Purcell Fitz Gerald, Defendant.

To the Honorable the Judges of the said Court:

The above-named defendant, Gerald Purcell Fitz Gerald, now and at all times saving and reserving unto himself all manner of objections and exceptions to the manifold errors in plaintiffs' Bill of Complaint, answering thereunto says:

79 1. I have no knowledge that the said Lida Eleanor Purcell Fitz Gerald is, as set forth in Paragraph 1 of plaintiffs' Bill, a citizen of the State of Pennsylvania, having her domicile therein at Uniontown. I know that in her petition to Parliament in 1907, and in an Act of Parliament founded thereon, passed July 26, 1907, (a copy of which is hereto annexed), she represented to be, and is referred to therein, as a subject of the King of Great Britain and Ireland, and as residing at Hyde Park Hotel, Knights Bridge, London, England. Since then she has resided most of the time out of the United States. If the averments as to her residence be material I pray that the plaintiffs shall prove the same. I admit the remaining facts set forth in said paragraph.

2. I admit the facts set forth in Paragraph 2 of plaintiffs' Bill.

3. I admit, as set forth in Paragraph 3 of said Bill, that the said William McClelland, Prothonotary, was appointed by your Honorable Court, Guardian ad litem of the infant plaintiffs, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, but I deny that the said appointment was duly or lawfully made.

4. I admit the facts set forth in Paragraph 4 of plaintiffs' Bill.

5. I admit the facts set forth in Paragraph 5 of plaintiffs' Bill.

6. I admit the facts set forth in Paragraph 6 of plaintiffs' Bill.

80 7. I admit the facts set forth in Paragraph 7 of plaintiffs' Bill.

8. I admit that the agreement set out in Paragraph 8 of plaintiffs' Bill, dated December 6, 1906, between the plaintiff Lida Eleanor Purcell Fitz Gerald and myself, is a correct copy of the agreement so made between plaintiff and myself; but I deny that the said agreement was made for "divers good and valuable considerations" as averred by Plaintiffs, but aver that the considerations for the said agreement were not good and valuable, but were unlawful and fraudulent considerations against public policy, as hereinafter set forth in Paragraphs 13, 14, 15 and 16 of this Answer, and that the said agreement is null and void.

I have no knowledge of the alleged record touching the recording of said contract set forth in said paragraph of plaintiffs' Bill, and I pray, if the same be material, that the plaintiffs shall make due proof thereof.

9. I believe the facts set forth in Paragraph 9 of plaintiffs' Bill to be substantially true, as therein set forth, but I have no means at present of accurately verifying their correctness.

10. I believe the facts set forth in Paragraph 10 of plaintiffs' Bill to be approximately true, as therein set forth, but I have no means at present of accurately verifying their correctness.

11. I do not know whether the fair market value of the properties referred to in Paragraph 11 of plaintiffs' Bill is as therein set forth, and if the same be material, I pray that the plaintiffs may
81 make due proof thereof.

I am unable to affirm or deny the accuracy of the approximate values set forth in the remainder of the said paragraph of plaintiffs' Bill, and if the same be material, I pray that plaintiffs may make due proof thereof.

12. I admit, as set forth in the first clause of Paragraph 12 of plaintiffs' Bill, that an Act of Parliament was passed subsequent to December 6, 1906, dissolving the marriage between the said Lida Eleanor Purcell Fitz Gerald and myself.

I deny that the payments made after December 6, 1906, pursuant to the provisions of the aforesaid agreement of that date, were distributed as averred in said paragraph by the defendant, Charles E. Lenhart, as Manager of the said Fayette Coke Company and the Shamrock Supply Company, but to the contrary thereof, aver that the said payments were made and the said sums were distributed by the defendant, Charles E. Lenhart, under said agreement, at my direction, he acting therein as my personal agent, making said payments and distributing said money for me and on my behalf.

I deny that a regular payment due to the Trustees named in said agreement, on June 30, 1910, was not then nor at any time since made, but was withheld by the said defendant, Lenhart, as Manager of the said property; but to the contrary thereof, I aver that the said payment was then, and has been since refused and withheld by the said Lenhart, as my personal agent, he acting therein

82 by my personal direction, and in my personal behalf.

I have no knowledge that the plaintiff, Josiah V. Thompson, has received the communication from the defendant, Lenhart, set forth in Paragraph 12 of plaintiffs' Bill, and if the same be material, I pray that the plaintiffs may make due proof thereof; but I admit that I personally instructed the said defendant, Lenhart, not to pay to the Trustees, as set forth in said alleged letter, and I admit that my attorney and counsellor-at-law specifically notified the said defendant, Lenhart, not to make any payment to the said Lida Eleanor Purcell Fitz Gerald, or for or on her account out of any of my properties. The reasons for my so instructing the said Lenhart are more fully and at length set out in Paragraph 17 of this Answer.

I believe it to be true, as set forth in the last clause of Paragraph 12 of plaintiffs' Bill, that up to June 30, 1910, the Trustees had received, pursuant to the terms of the aforesaid agreement, the sum of Thirty Nine Thousand Nine Hundred and Ninety Dollars ($39,990) on account of the fund of Three Hundred Thousand Dollars ($300,000) directed to be accumulated by them; but I deny that the said Trustees still hold said funds, and have invested the same pursuant to the aforesaid agreement, but on the contrary thereof, I aver that the said Josiah V. Thompson in violation of his duties under said trust, and of the laws of this Commonwealth, and in bad faith as Trustee, has personally borrowed and used for his own personal benefit and behoof a large part of the said $39,990 which came into his hands as Trustee, for which reason, and for other reasons hereinafter set forth, I aver that the said Josiah

83 V. Thompson is an unfit and improper person to act as Trustee, and to manage the funds of said trust, and as hereinafter prayed for, I ask that the said Josiah V. Thompson be removed

from his office, as Trustee, in order that a competent and faithful person may be appointed in his stead, and that he, by decree of this Court, be compelled to repay said moneys so borrowed by him into said Trust Fund, and that he account to said Trust for all the income, profits, benefits and issues received by him, by or on account of the use of said moneys while so illegally used and appropriated by him.

13. Answering Paragraph 13 of plaintiffs' Bill, I admit that I have wholly repudiated the aforesaid agreement and declared the same not binding on me, and that I have refused, as one of the Trustees, to receive, apply or pay over any part of the said income and trust fund provided in said agreement, and that I have thereby prevented the execution of the said trusts, and as my reason therefor, I aver as follows:

On the 16th day of February, 1906, I then being a British subject domiciled in Ireland, did file in His Majesty's High Court of Justice in Ireland, King's Bench Division (Matrimonial) a petition praying said Court to decree a divorce a mensa et thoro from my then wife, the said plaintiff, Lida Eleanor Purcell Fitz Gerald wherein I did charge my said wife with adultery. On the 21st day of February, 1906, my said wife, Lida Eleanor Purcell Fitz Gerald, did file in the said High Court of Justice her petition against me, wherein she prayed for a divorce a mensa et thoro, and in which petition she did charge me with the offences of adultery and
84 cruelty. The said causes were proceeded with and Bills of
Particulars were filed by each of us in our said suits under orders of the said Court, setting forth the particulars of said offences so charged. During the said litigation, to wit: on or about the 3d day of September, 1906, my said wife and I did agree as follows:

That I would withdraw my petition for divorce against her, and that I would not contest her petition for divorce, but would admit the said charges of adultery and cruelty and facilitate her in procuring said divorce a mensa et thoro in said Irish Court, and that upon procuring such decree, as absolute divorces are not granted under the Irish law, she would proceed to apply for and secure an Act of Parliament, declaring an absolute divorce from the bonds of matrimony between her and me. In compliance with and pursuance of said agreement, I did on the 5th day of December, 1906, withdraw my said action for divorce and the charges therein against my wife and did not contest my said wife's petition for divorce, and did make the admissions heretofore referred to. In consequence thereof, on the said 5th day of December, 1906, my said wife obtained a decree of said Court divorcing her a mensa et thoro. On the succeeding day, to wit: December 6, 1906, in further pursuance of said agreemnt heretofore referred to, and in consideration of the said acts on her part and my part heretofore referred to the contract or agreement set forth in plaintiffs' Bill, and which is the foundation of these proceedings, was entered into between her and me, the further consideration for said agreement on her part being,
85 as set forth therein, the procurement by my said wife of an
Act of Parliament divorcing her and me. I particularly call the attention of the Court to the second clause of said agreement, as

set forth in Plaintiffs' Bill, wherein the said consideration is set forth in the following language:

(*a*) "2. As and from the date of the passing of the Act of Parliament dissolving the marriage of the husband and wife, and in consideration of the premises, the husband will pay to the trustees in trust, &c."

and I call the attention of the Court to the third paragraph of the said agreement or contract, wherein the consideration for the same is again set forth in the following language:

(*b*) "3. For the consideration aforesaid the husband will also pay to the Trustees out of the balance of his nine-tenths (9/10's) share of the profits arising out of the two companies named above, to be paid to and collected by the Trustees from time to time, from the passing of the said Act of Parliament in manner as follows, to wit:"

and I call the attention of the Court to Clause 11 of the said contract or agreement, wherein it is provided as follows:

(*c*) "'11. It is hereby agreed by and between the husband and the wife that the following provisions relating to their children shall take effect from the time of the passing of the said Act of Parliament, &c."

14. At the time that the said agreement was so as aforesaid entered into, to wit: December 6, 1906, the said Act of Parliament had not been passed or applied for, but thereafter, the said plaintiff, Lida Eleanor Purcell Fitz Gerald did, in pursuance of said agreement or contract so, as aforesaid, entered into with me, make her petition and complaint to His Majesty, the King of Great Britain and
86 Ireland that an act might be passed "by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons" in Parliament assembled, divorcing her, the said Lida Eleanor Purcell Fitz Gerald from the bond of matrimony existing between her and me, her husband, and wholly dissolving, annulling, vacating and making void the same, and in consummation of said agreement and of the performance upon her part of the consideration for the said agreement, she did procure the passage by Parliament of said absolute divorce to wit: on the 26th day of July, 1907. A true copy of the said Act of Parliament is hereto annexed marked "Exhibit 1."

15. I aver that the said agreement or contract set forth in plaintiffs' Bill, and which is the foundation of the present proceedings, and the covenants and conditions thereof sought to be enforced by this present action, were by the terms of said contract to become operative only in the event of and when the said Lida Eleanor Purcell Fitz Gerald obtained the passing of said Act of Parliament. Wherefore, I do aver that the making of said agreement was against public policy, and that the same is wholly void and of no effect, and that the same is not enforceable and should not be enforced by this Honorable Court, but that the plaintiffs' Bill of Complaint should be dismissed.

16. I aver that all of the foregoing facts were fully known to the plaintiff, Josiah V. Thompson, who is the uncle of the said Lida Eleanor Purcell Fitz Gerald, and that in the making of said agree-

ment, and in all the acts and negotiations leading thereto, the
87 said Thompson, acting for his said niece, did instigate, induce and procure the said agreement to be entered into by my said wife and myself.

17. I deny that the breach of said contract took place upon my part, but to the contrary thereof, I aver that the said Lida Eleanor Purcell Fitz Gerald, in violation of the terms and conditions of the said agreement and the understanding of the parties thereto, and of a supplemental agreement made between us, dated March 4, 1907, a true copy of which is hereto annexed marked "Exhibit 2," has heretofore refused to pay for the education and maintenance of our three children out of the moneys paid to her by me under the said agreement, and in consequence thereof I have been put to wholly unjust and improper charges for the maintenance and education of our said three children, because of the neglect of the said Lida Eleanor Purcell Fitz Gerald, and because of her failure and refusal to observe upon her part the conditions of the said agreement, and because of her breach thereof, the expense to which I have thereby been put has been upwards of Five Thousand Dollars ($5000) yearly. Since September 18, 1909, the said Lida Eleanor Purcell Fitz Gerald has maintained and paid for the maintenance of said children only during eight (8) weeks and five (5) days, to wit: three (3) weeks at the Christmas Holidays of 1909; two (2) weeks and five (5) days at the Easter Vacation, 1910, and the last three (3) weeks of the September vacation, 1910. During all the remainder of said time from September 18, 1909, until this present, the entire cost
88 of the maintenance and education of the said children has been borne and paid by me, and I have been obliged to maintain them during all of said period and am now maintaining and educating them because the said Lida Eleanor Purcell Fitz Gerald (except for the eight weeks and five days above mentioned) has wholly refused and neglected to maintain the said children or to pay for their maintenance and education, though frequently requested so to do. By her solicitors in England she has denied that she is liable for the maintenance and education of said children, notwithstanding the express provision of the said contract of December 6, 1906, and its supplement of March 4, 1907, and notwithstanding the clear intent of the same.

The said Lida Eleanor Purcell Fitz Gerald does not maintain any home in England, where said children are, and under the order of the English Court are obliged to remain. Neither does she maintain a permanent home at any place; so that there is no home of their said mother to which the said children may go, and where they may be maintained and supported, as was contemplated and intended by the said agreement referred to. On the other hand, I have maintained at great expense, a home at the Island, Waterford, in Ireland, to which my children may at any time go, or be brought, and where they may be properly maintained in a manner conformable to their station in life, and where, at such time as I am allowed their custody, I do maintain them in a manner fit and conformable, as aforesaid. Were it not for the failure of their mother, the said Lida Eleanor

Purcell Fitz Gerald, to maintain the said children as here-
89 tofore set forth, and her neglect and failure to provide a home for them, I would, in consequence of the large sums of money required to be paid by me under the said agreement of December 6, 1906, have closed my said residence and home at the Island, Waterford, Ireland, but which, because of the breach of contract upon the part of the said Lida Eleanor Purcell Fitz Gerald I have been obliged to maintain as a home at great cost and charges, to wit: at an expense exceeding Fifteen Thousand Dollars ($15,000) yearly.

18. I aver that I have no purpose or desire not to provide properly for my children and to make due provision for their fit maintenance, education and support, and that if it shall be adjudged that the said contract and agreement is void, I shall nevertheless voluntarily make and execute such necessary and proper agreements, trust and conveyances as shall secure to my said three children an amount equal at least to the sum of $300,000, the amount provided for as a Trust Fund in said agreement.

19. Answering Paragraph 14 of the plaintiffs' Bill, so far as the same has relation to facts within my knowledge, I deny that the defendant, Lenhart, "has violated his aforesaid trust in that he has unquestionably obeyed the directions of the defendant, Fitz Gerald," as recited in said paragraph. The said Lenhart, in observing my directions not to pay any further moneys under said contract, acted, not as Trustee, but as my personal agent, and, as he was in duty bound as such agent, did follow my directions, instructions and authority. And I further aver that, as such agent,
90 he had no power to pay moneys under said contract except by my order and direction. I deny that the said Lenhart is subject to my domination and control, and that by reason thereof he has failed and refused to perform his duties as Trustee, and I deny that he has any antagonistic personal interests, as Manager of the copartnership properties, which unfit him to continue to act as Trustee under the aforesaid agreement. On the contrary thereof, I aver that his position as Manager of the said Companies enables him the better to know the profits of the said Companies and the amounts which, by the terms of the said agreement, I am to pay thereunder. I deny that the said Lenhart has failed to perform his duties as Trustee, but aver that he has performed all the duties of the said Trust which he might lawfully do and perform.

Wherefore, I respectfully pray your Honorable Court as follows:

(1) To declare, adjudge and decree that the said contract, in plaintiffs' Bill referred to, dated December 6, 1906, is null and void.

(2) That the said Josiah V. Thompson, plaintiff, be removed from his office as Trustee of the children's Fund, provided for in said contract of December 6, 1906.

(3) That the said Josiah V. Thompson, plaintiff, be required to account to the Trustees of said Fund for all the rents, issues, profits and income, which have in anywise accrued to him, or to which

he may be entitled, by reason and on account of his said unlawful, personal use and appropriation of the moneys in his hands

91 as aforesaid.

(4) That I may be hence dismissed with my reasonable costs in this behalf expended.

STATE OF PENNSYLVANIA,
Philadelphia County, ss:

Before me the subscriber, a Notary Public, in and for said County and State, personally appeared the above-named Gerald Purcell Fitz Gerald, who being duly sworn, did depose and say, that the facts set forth in the foregoing Answer, so far as stated of his own knowledge, are true, and so far as they appear to be upon information and belief, he believes them to be true.

—— ——.

Sworn to and subscribed before me this — day of December, A. D. 1910.

—— ——.

92

EXHIBIT 1.

An Act to Dissolve the Marriage of Lida Eleanor Purcell Fitz Gerald with Gerald Purcell Fitz Gerald, Her Present Husband, and to Enable Her to Marry Again, and for Other Purposes. (26th July, 1907.)

A. D. 1907.

Humbly sheweth and complaineth unto Your most Excellent Majesty your true and faithful subject Lida Eleanor Purcell Fitz Gerald now residing at Hyde Park Hotel Knightsbridge in the county of London the wife of Gerald Purcell Fitz Gerald of the Island Waterford in the county of Waterford Ireland gentleman:

That on the 1st day of March 1899 your subject then Lida Eleanor Nicolls spinster the daughter of John A. Nicolls of Uniontown Pennsylvania in the United States of America was lawfully married at the Cathedral of St. Vibiana in the city of Los Angeles county of Los Angeles state of California in the United States of America according to the rites of the Roman Catholic Church to her present husband the said Gerald Purcell Fitz Gerald who was then and now is domiciled in Ireland:

That your subject and the said Gerald Purcell Fitz Gerald lived and cohabited together as husband and wife after the said marriage at Duarte Los Angeles aforesaid at Uniontown aforesaid at the Island Waterford aforesaid at No. 1 Oakwood Court Kensington in the county of London at the Carlton Hotel Pall Mall in the said county of London and at the Crown Hotel New Forest in the county of Hants and elsewhere from the date of said marriage until the month of June, 1904:

93 That there has been issue of the said marriage three children all of whom are still living namely three sons John Purcell Fitz Gerald born on or about the 23rd day of September 1899 and Edward Maurice Purcell Fitz Gerald and Gerald Purcell Fitz Gerald (twins) born on or about the 24th day of October 1900:

That your subject's husband the said Gerald Purcell Fitz Gerald has treated your subject with great cruelty has used threats towards her and has frequently assaulted her:

That in or about the month of January 1900 the said Gerald Purcell Fitz Gerald at Duarte California became violent and abusive and your subject tried in consequence to run from the room to the baby's room for safety. The said Gerald Purcell Fitz Gerald ran after and stopped your subject and said "If you go in there I will go in and take the child and beat it to death" and "If I strike you (meaning your subject) while I am in this mood I will kill you" and that he then forced your subject back again into the room from which she had fled:

That in or about the month of March 1902 the said Gerald Purcell Fitz Gerald at Duarte threatened to kill your subject:

That in or about the month of March 1902 the said Gerald Purcell Fitz Gerald at Duarte aforesaid dragged your subject out of bed into the middle of the room till in consequence of your subject's cries a lady came to her help and the said Gerald Purcell Fitz Gerald let her go:

That in May 1903 the said Gerald Purcell Fitz Gerald at the Van Nuys Hotel Los Angeles seized and shook your subject most violently until her hat fell off and her hair fell down:

94 That in or about October 1903 the said Gerald Purcell Fitz Gerald at Clarehaven Newmarket kicked your subject out of bed to the floor:

That in or about the month of February 1904 at the Island Waterford Ireland the said Gerald Purcell Fitz Gerald locked your subject in his room for over two hours and accused your subject of trying to poison him and when he unlocked the door your subject fled from the room into the nursery but the said Gerald Purcell Fitz Gerald followed and threatened to break open the door and on your subject opening the door was dragged violently by the said Gerald Purcell Fitz Gerald from the nursery back into his said room:

That in or about the month of June 1904 at No. 1 Oakwood Court Kensington aforesaid the said Gerald Purcell Fitz Gerald seized your subject by her arms pinching and hurting her and marking the flesh:

That on the 17th day of June 1904 at the Great Western Railway Hotel Paddington in the County of London the said Gerald Purcell Fitz Gerald committed adultery with a woman whom he took with him to the said hotel:

That on the 16th day of February 1906 your subject filed a petition in the King's Bench Division (Matrimonial) of the High Court of Justice in Ireland and issued a citation against the said Gerald Purcell Fitz Gerald and at the hearing of the said petition on the 5th day of December 1906 the Right Honorable Lord O'Brien Lord Chief Justice of Ireland by his judgment found that the said Gerald Purcell Fitz Gerald was guilty of adultery and cruelty and he accordingly pronounced a decree of divorce and separation from bed board and mutual cohabitation with costs against the said
95 Gerald Purcell Fitz Gerald.

That the said Gerald Purcell Fitz Gerald has by his cruelty and adulterous and criminal conduct precluded every possibility of reconciliation and dissolved the bonds of matrimony on his part and deprived your subject of the comforts of matrimony unless the said marriage be declared void and annulled by the authority of Parliament:

May it therefore please your Majesty (out of Your Majesty's goodness and compassion to your subject's misfortune and calamity) that it may be enacted and be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:

Short title.

1. This act may be cited for all purposes as Fitz Gerald's Divorce act 1907.

Marriage declared void and Lida Eleanor Purcell Fitz Gerald enabled to marry again.

2. The bond of matrimony between the said Lida Eleanor Purcell Fitz Gerald and Gerald Purcell Fitz Gerald her husband being violated and broken by the manifest and open adultery of the said Gerald Purcell Fitz Gerald and by his cruelty to the said Lida Eleanor Purcell Fitz Gerald shall be and the same is hereby from henceforth wholly dissolved annulled vacated and made void to all intents constructions and purposes whatsoever and it shall be lawful for the said Lida Eleanor Purcell Fitz Gerald at any time or times hereafter to contract matrimony and to marry as well in the lifetime of the said Gerald Purcell Fitz Gerald as after his decease with any man or men whom she might lawfully marry in case the said Gerald Purcell Fitz Gerald was actually dead and every such future marriage or marriages when duly had and celebrated shall
96 be good and lawful and shall be so deemed and adjudged and taken in all countries and to all intents constructions and purposes whatsoever and every child born in such matrimony shall be deemed and adjudged and taken to be born in lawful wedlock and shall be legitimate and inheritable to and shall inherit any honours manors messuages lands tenements and hereditaments from by or through his or her parents' ancestors and relations and shall and may derive have and transmit titles to any real or personal estates and enjoy all other privileges as if the marriage of the said Lida Eleanor Purcell Fitz Gerald of which such child shall be the issue had been solemnized after the decease of the said Gerald Purcell Fitz Gerald.

Lida Eleanor Purcell Fitz Gerald to be entitled to rights in property of future husband.

3. The said Lida Eleanor Purcell Fitz Gerald shall (unless barred by jointure or otherwise) be entitled to dower free bench and thirds of the estate of such husband or husbands as she shall hereafter marry whereof he or they shall be seized or entitled as fully as if the said Gerald Purcell Fitz Gerald had died before the marriage of the said Lida Eleanor Purcell Fitz Gerald with such future husband and such future husband or husbands as she shall so marry shall be entitled to be tenant by the courtesy of the manors messuages lands tenements and hereditaments of the said Lida

Eleanor Purcell Fitz Gerald as fully as if the said Gerald Purcell Fitz Gerald had died before the marriage of the said Lida Eleanor Purcell Fitz Gerald with such husband or husbands.

4. That the said Gerald Purcell Fitz Gerald and all persons claiming under or to claim by from or under him is are and shall forever be barred and excluded of and from all rights titles claims and
97 interests of in to or out of lands tenements and estates real personal and mixed and all ornaments of the person and wearing apparel and all goods chattels and personal estate and effects whatsoever which the said Lida Eleanor Purcell Fitz Gerald now enjoys or is entitled to in possession in her own right or which she shall at any time hereafter acquire become seized or possessed of or entitled to by descent gift devise purchase or otherwise howsoever during the estate and interest of her the said Lida Eleanor Purcell Fitz Gerald her heirs executors administrators and assigns therein respectively and the said Lida Eleanor Purcell Fitz Gerald her heirs executors administrators and assigns shall have hold and enjoy the same during her and their estate and interest therein for her and their own proper use and benefit exclusive of the said Gerald Purcell Fitz Gerald his heirs executors administrators and all and every other person or persons whomsoever claiming or to claim by from or under him.

Gerald Purcell Fitz Gerald excluded from rights in or to property of Lida Eleanor Purcell Fitz Gerald and in or to property of said Lida Eleanor Purcell Fitz Gerald hereafter required.

EXHIBIT 2.

This indenture made the fourth day of March One thousand nine hundred and seven between Gerald Purcell Fitz Gerald of the Island, Waterford in Ireland (hereinafter referred to as "The Husband") of the one part and Lida Eleanor Purcell Fitz Gerald wife of the said Gerald Purcell Fitz Gerald (hereinafter referred to as "the Wife") of the other part.

The Husband and Wife hereby mutually covenant and agree with one another.

(*a*) That the W[illegible] (except as to three consecutive months
98 in each year upon [illegible] demand of the Husband) shall have the custody control and maintenance of the three children of their marriage and the Husband agrees not to oppose their removal beyond the jurisdiction of the Courts of Great Britain or Ireland during nine months in any year.

(*b*) Upon the death of the wife the custody control and maintenance of the said three children shall revert to the husband.

(*c*) The Husband agrees that during the three months in which he may claim the Society and Companionship of the said children in any year they or either of them may be accompanied by a Nurse, Governess, Tutor or Servant appointed by the Wife the Husband to give the wife at least two months' notice in each year of the particular three months of that year during which he desires their custody.

(*d*) The Wife shall have the right to the society and companionship of the three children during the nine months of any year but she agrees that they shall be sent to a Boarding School in England to be agreed by the Husband and Wife from the time when they reach the age of ten years except as to the child Gerald who need not go to a Boarding School before eleven years and that while they are at school she will not remove them therefrom nor claim that more than half of the vacation or holiday enjoyed by the children shall be spent with her.

(*e*) The Wife undertakes not to retain the children in residence in London during the months in which fog is prevalent or likely to prevail.

99 In witness whereof the parties have hereunto set their hands and seals the day and year first in these presence written. (Signed)

LIDA ELEANOR PURCELL FITZ GERALD. [L. S.]

Signed sealed and delivered by the above named Lida Eleanor Purcell Fitz Gerald in the presence of

J. M. McDONNELL,
Solicitor,
32, Great George Street, Westminster, S. W.

Endorsement: No. 618. In the Court of Common Pleas of Fayette County. In Equity. Josiah V. Thompson, Trustee, etc., et al, vs. Gerald Purcell Fitz Gerald, et al. Separate Answer of Gerald Purcell Fitz Gerald, Defendant. Robinson, McKean & Martin, Michael J. Ryan, James Gay Gordon, William A. Stone, Attorneys for Defendant, Gerald Purcell Fitz Gerald.

100 In the Court of Common Pleas of Fayette County, Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON, Trustee, etc., et al.
vs.
GERALD PURCELL FITZ GERALD, et al.

Interrogatories, by Way of Discovery, of the Defendant, Gerald Purcell Fitz Gerald, to Josiah V. Thompson, Trustee.

To Josiah V. Thompson, Trustee:

Interrogatory 1. It is stated in paragraph "12" of the Bill that up to June 30, 1910, Thirty Nine Thousand, Nine Hundred and Ninety Dollars ($39,990) had been received by the Trustees. Did you at any time borrow or personally use any part or portion of the said trust money?

Interrogatory 2. If you answer yea to the foregoing interrogatory, state when you borrowed or personally used the same, and how much you so borrowed or personally used, and what evidence of indebtedness you gave to the trustees of said fund for the money so borrowed or personally used.

Interrogatory 3. If you answer affirmatively to the first interrogatory, state how you used the sums of money so borrowed and personally used by you and what benefits, profits or advantage you derived from such personal use of the money so used. If
101 you invested the said moneys in the purchase of real estate,
leases or other property, fully state all the facts with reference to the same and describe the said property and whether you still own the same and where it is situate.

Interrogatory 4. If in answer to the foregoing interrogatory you should state that you purchased any property, real or personal, with the moneys of the said trust personally used by you and have since sold the same, state specifically what you paid for such property and what you received at the sale thereof, giving both the time of the purchase and the time of the sale thereof together with the name or names of the person or persons from whom you bought, and to whom you sold any such property.

ROBINSON, McKEAN & MARTIN,
MICHAEL J. RYAN,
JAMES GAY GORDON,
WILLIAM A. STONE,
Solicitors for the Defendant Gerald Purcell Fitz Gerald.

Endorsement: No. 618—In the Court of Common Pleas of Fayette County—In Equity—Josiah V. Thompson, Trustee, etc., et al. vs. Gerald Purcell Fitz Gerald, et al.—Interrogatories to the Plaintiff, Josiah V. Thompson—Notice to the Plaintiff, Josiah V. Thompson: You are hereby required to answer the within Interrogatories and each of them within ten (10) days. And you are further notified, that in case of neglect to answer any Interrogatory and serve a copy of the same upon the defendant, within that time, the defendant will be entitled to move for an attachment to compel an answer, sec. reg. Witness our hands at Uniontown, this — day of —, 1910—Robinson, McKean & Martin, Michael J. Ryan, James Gay Gordon, William A. Stone, Solicitors for the Defendant, Gerald Purcell Fitz Gerald.

102 In the Court of Common Pleas of Fayette County, Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON et al.
vs.
GERALD PURCELL FITZ GERALD et al.

Sur Petition for Appointment of Sequestrator or Receiver.

And now, this 30th day of November, 1910, comes the defendant, Gerald Purcell Fitz Gerald, by his attorneys, and moves the Court to strike from the record of the said cause the petition of the plaintiffs praying the Court, pending action on the said bill, to appoint a sequestrator or receiver, and "that Lenhart, as manager account for nine-tenths of the rents, issues and profits of said Fayette Coke Company and Shamrock Supply Company, being the interest therein of said Gerald Purcell Fitz Gerald; said officer of the Court to receive and receipt for and disburse the same as this Court shall hereafter direct," and assigns the following reason for said motion:

Because the said petition is not printed on white sized paper of a convenient size, as required by the Pennsylvania Equity Rules.

ROBINSON, McKEAN & MARTIN,
MICHAEL J. RYAN,
JAMES GAY GORDON,
WILLIAM A. STONE,
Attorneys for the Defendant Gerald Purcell Fitz Gerald.

103 Endorsement: No. 618—In the Court of Common Pleas of Fayette County—In Equity—Josiah V. Thompson, Trustee, etc., et al. vs. Gerald Purcell Fitz Gerald, et al.—Motion to strike from the Record Petition for Receiver, etc.—Robinson, McKean & Martin, Michael J. Ryan, James Gay Gordon, William A. Stone, Attorneys for the Defendant, Gerald Purcell Fitz Gerald—Filed Nov. 30, 1910.

104 In the Court of Common Pleas of Fayette County, Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON, Trustee, etc., et al.
vs.
GERALD PURCELL FITZ GERALD et al.

Demurrer to Petition for Appointment of Sequestrator or Receiver.

And now, comes the defendant, Gerald Purcell Fitz Gerald, and demurs to the petition of the plaintiffs praying for the appointmen of a Sequestrator or Receiver pendente lite and for other relief, and assigns the following causes of demurrer:

First. Because the said petition is not verified by a proper oath.

Second. Because the said petition does not aver that the property sought to be taken possession of by a receiver is in danger of destruction, injury, waste or removal from the jurisdiction or that the plaintiffs will suffer any injury to their rights if a receiver be not appointed, or that a receiver is necessary to preserve the property.

Third. Because the said petition does not show any title in the plaintiffs.

105 Fourth. Because the said petition does not set forth any fact or facts sufficient to move the Court to grant the relief prayed for in the said petition.

Wherefore, he prays judgment, and that he may be hence dismissed with his reasonable costs in this behalf sustained.

GERALD PURCELL FITZ GERALD.

State of Pennsylvania,
Fayette County, ss:

Gerald Purcell Fitz Gerald, being duly sworn according to law, doth depose and say, that the foregoing demurrer is not interposed for vexation or delay.

GERALD PURCELL FITZ GERALD.

Sworn to and subscribed before me this 30th day of November A. D. 1910.

MARY KATE O'BRYON, [seal.]
Notary Public.

My Commission Expires March 10, 1913.

Endorsement: No. 618—In the Court of Common Pleas of Fayette County—In Equity—Josiah V. Thompson, Trustee, etc., et al. vs. Gerald Purcell Fitzgerald, et al.—Demurrer to Petition for Appointment of Receiver, etc.—Robinson, McKean & Martin, Michael J. Ryan, James Gay Gordon, William A. Stone, Attorneys for the Defendants, Gerald Purcell Fitz Gerald—Filed Nov. 30, 1910.

106 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the Trusts Within Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee of the Trusts Within Described; Charles E. Lenhart, as Trustee of the Trusts Within Described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Coke Company, and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company; and Shamrock Supply Company, Defendants.

Demurrer.

Charles E. Lenhart for himself as one of the partners as Fayette Coke Company and Shamrock Supply Company; and Charles E. Lenhart, Manager of said Fayette Coke Company and Shamrock Supply Company, co-partnerships, defendant, demurs to the whole Bill filed by plaintiffs in this case and for cause of demurer shows:

I.

That upon the face of the Bill of plaintiffs are not entitled to any relief as against the defendant Lenhart either as one of the partners of said copartnerships, the Fayette Coke Company and the Shamrock Supply Company, or as manager of said copartnerships.

II.

It nowhere appears in the Bill that the said defendant Lenhart as
partner has any duty or obligation to perform towards the
107 plaintiffs or any of them, or that the plaintiffs have any right
of any kind against the said defendant as partner of the
defendant Fitz Gerald.

III.

It nowhere appears by the Bill that the plaintiffs have any right of any kind against the defendant Lenhart as Manager of the Fayette Coke Company or of the Shamrock Supply Company, or that the said defendant as Manager, as aforesaid, is under any obligation to the plaintiffs or any of them.

IV.

It nowhere appears in the Bill that the defendant Lenhart as partner or manager, as aforesaid, had or has the custody, control or distribution of any of the profits of said copartnerships belonging to the defendant Fitz Gerald.

V.

The defendant Lenhart as partner or manager is not a party to the agreement set forth in the Bill and upon which the right of action of the plaintiffs, if any, is founded.

VI.

It nowhere appears in the Bill thát the defendant Lenhart is under any obligation to continue, or that he will continue for any certain period, the partner of the defendant Fitz Gerald or Manager of said copartnerships, and no effective decree can be entered against him in either of said capacities.

VII.

It nowhere appears in the Bill that there is any obligation on the
defendant Lenhart eithér as partner or manager to account
108 to any one but his copartner Fitz Gerald; and the Bill contains
no allegation whatever that he has ever refused or neglected, or that there are any grounds upon which to found a belief that he will hereafter refuse or neglect to properly account as partner and manager to said defendant Fitz Gerald, or his duly authorized agent or representative, for the nine-tenths of the profits of said Fayette Coke Company and Shamrock Supply Company.

VIII.

There is nothing in the Bill to entitle the plaintiffs, or any of them to have a lien declared against the one-tenth interest of the defendant Lenhart in said copartnership properties.

IX.

There is nothing in the Bill to entitle the plaintiffs, or any of them, to have the defendant Lenhart as partner or otherwise restrained from alienating or encumbering his one-ninth interest in said copartnership properties.

JOHNSON & RUSH,
Solicitors for Charles E. Lenhart,
Defendant, as Aforesaid.

Commonwealth of Pennsylvania,
County of Fayette, ss:

Charles E. Lenhart being duly sworn according to law says that the foregoing demurrer is not interposed for delay.

CHARLES E. LENHART.

Sworn to and subscribed before me this 6″ day of A. D., 1910.

WM. McCLELLAND,
Prothonotary.

109 Endorsement: No. 618—In Equity—In the Court of Common Pleas of Fayette County, Pennsylvania.—Between Josiah V. Thompson, Trustee &c., et al., Plaintiffs and Gerald Purcell Fitz Gerald et al., Trustees, &c., Defendants—Separate Demurrer of Charles E. Lenhart, Partner and Manager—Filed Dec. 6″ 1910—Johnson & Rush Solicitors for Defendant, Charles E. Lenhart—Printer's charges $9.00.

110 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, of the Trusts Within Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Plaintiffs,

and

Gerald Purcell Fitz Gerald, Individually and as Trustee of the Trusts Within Described; Charles E. Lenhart, as Trustee of the Trusts Within Described; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Coke Company, and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company, and Shamrock Supply Company, Defendants.

Answer.

Charles E. Lenhart, one of the defendants, saving all manner of exception to the inadequacy, insufficiency and manifold inconsistencies of the Bill of the plaintiffs, makes answer thereto as one of the trustees of the trusts described in the Bill, as follows:

I.

I neither admit nor deny the allegations of the first paragraph of the Bill, as I have no certain knowledge of the facts therein alleged.

II.

I admit the statements contained in the second paragraph of the Bill.

III.

I admit that William McClelland was appointed guardian ad litem as stated in the third paragraph of the Bill, but I deny the regularity and validity of said appointment. 111

IV.

I deny that Gerald Purcell Fitz Gerald owns the real estate described in the Bill, as alleged in paragraph fourth of the Bill, and aver that he owns but the undivided nine-tenths thereof, and that the other one-tenth thereof is owned by me in my own right and not as trustee in fee simple. The other statements of said paragraph four I admit.

V.

I admit the statements of paragraph fifth of the Bill.

VI.

I admit the facts set forth in paragraph sixth of the Bill.

VII.

I admit the allegations of the seventh paragraph of the Bill.

VIII.

I admit that the statements of the eighth paragraph of the Bill are correct so far as I have knowledge of the same.

IX.

I admit that the facts set forth in the ninth paragraph of the Bill are substantially correct.

X.

I admit that the Shamrock Supply Company is a partnership operating a general merchandizing store as stated in paragraph tenth of the Bill; and I also admit that the average annual gross and net earnings of said company for the last five years, including good and bad years, have been approximately as stated in said paragraph.

112 XI.

I admit that the average annual net profits of said Fayette Coke Company for the last five years, including good and bad years, have been approximately as stated in the eleventh paragraph of the Bill. I confine my answer in this and the preceding paragraph to the last five years for the reason that the coking plant of said company was enlarged about five years ago, and prior to that time the average profits were less than as stated in the Bill. The other allegations of said paragraph I neither admit nor deny, being advised that I am not required to answer the same.

XII.

I deny that the profits of the Fayette Coke Company and the Shamrock Supply Company were distributed by me as manager of said companies, as stated in paragraph twelfth of the Bill; and I also deny that the payment due the trustees June 30, 1910, was withheld by me as manager of said properties, as set forth in last said paragraph of the Bill. But to the contrary thereof, I aver that said profits were distributed by me as one of the owners of said properties, and as agent of my co-partner and co-owner, Gerald Purcell Fitz Gerald; and that said payment was withheld by me as agent of said Fitz Gerald in compliance with the specific and positive direction of my said principal.

I deny that up to June 30, 1910, the trustee had received, pursuant to the terms of the aforesaid agreement, the sum of $39,990, on account of the fund of $300,000, directed to be accumulated by them, as alleged in said twelfth paragraph of the Bill, and aver that
the amount so received by said trustees up to said date was
113 but $34,368.27, in all, of which sum $1,773.76, thereof was
accrued interest.

I admit the remaining allegations of said twelfth paragraph of the Bill.

XIII.

I am advised that I am not required to answer the allegations of the thirteenth paragraph of the Bill, and I therefore neither affirm nor deny the same.

XIV.

Answering paragraph fourteenth of the Bill, I deny, as alleged in said paragraph, that I have unquestioningly obeyed the direction of the defendant Fitz Gerald to withhold from the aforesaid trustees all sums due and payable to them by virtue of the aforesaid agreement of December 6, 1906. I also deny that I have wholly failed and neglected to perform my duties as trustee since the aforesaid direction of the defendant Fitz Gerald, and that I have neglected and refused to exercise any independent judgment in the premises, and that I am entirely subject to the domination and control of the defendant Fitz Gerald, as alleged in said paragraph.

As a further answer to said paragraph I aver that all sums due and payable to said trustees under said agreemnt of December 6, 1906, up to December 30, 1909, were duly accounted for and paid over to said trustees by me as the personal agent of the defendant Fitz Gerald, and out of his nine-tenths interest in the profits of the properties aforesaid, and by his specific authority and direction so to do.

That prior to June 30, 1910, I was notified by the defendant Fitz Gerald, through his attorney and counselor at law, not to make the payment to said trustees which would be due June 30, 1910, by the
terms of said agreement of December 6 1906.

114 That it is specifically provided by the third paragraph of
said agreement of December 6, 1906, that the payments to the trustees shall be made by the defendant Fitz Gerald out of the balance of his nine-tenths share of the profits arising out of said two companies, to wit: the Fayette Coke Company and the Shamrock Supply Company. That said agreement does not give me, either as general manager of said companies, or as one of the trustees or

otherwise, any power or authority to take or appropriate any part of the nine-tenths share of the defendant Fitz Gerald in the profits of said two companies, and pay the same over to the trustees appointed by said agreement.

That after I was deprived of the right and authority as agent of said Fitz Gerald to make any further payments to the said trustees out of said Fitz Gerald's nine-tenths of the profits of said two companies, by his positive direction not to do so, as stated above, I was advised by counsel that I could not make such payments without incurring a personal liability to said Fitz Gerald for the sum or sums so paid; and this notwithstanding I was one of the trustees, for said agreement of December 6, 1906, by which I was appointed trustee, gave me no authority as trustee to make such appropriation and payment.

I was appointed trustee under said agreement of December 6, 1906, by the plaintiff, Josiah V. Thompson. My situation and business relations and connections with the defendant Fitz Gerald were practically the same then as now, and this was fully understood by the Plaintiffs Thompson and Lida Eleanor Purcell Fitz Gerald. I have no personal objection to being relieved of my duties as a trustee,
but I deny that my personal interests are antagonistic to my
115 duties as a trustee, or that I have failed to perform my duties
as a trustee.

XV.

I deny that this Honorable Court has any jurisdiction, or any legal or equitable power or authority to establish a lien upon my individual one-tenth interest in the properties known as the Fayette Coke Company and the Shamrock Supply Company, for the benefit of the beneficiaries under the aforesaid agreement of December 6, 1906, to secure the payment of the sums by said agreement provided to be paid, as prayed for by the plaintiffs in paragraph second of their prayer for relief.

XVI.

I deny that I have the power or authority in law or in fact to account for, or that I am legally or equitably required to pay over to the trustees now in office, or to other trustees, sequestrator or receiver that may be appointed, the proportion of the profits of the Fayette Coke Company and the Shamrock Supply Company provided by the aforesaid agreement of December 6, 1906, to be paid to the trustees, except as to such of said profits as have already come into my hands as trustee under said agreement as stated in paragraph twelve hereof, or that may hereafter come into my hands as such trustee. And I deny that this Court has any jurisdiction, or any legal or equitable power or authority to direct me so to account and pay over as prayed for in paragraph four of plaintiffs' prayer for relief, except as aforesaid.

XVII.

I deny that the nine-tenths of the profits of the Fayette Coke Company and the Shamrock Supply Company for the nine months

ending September 30, 1910, or any part thereof, are now or ever have been in my hands and control as trustee, as aforesaid;
116 and I deny that I have the power in fact or in law, or that I am legally or equitably required to pay over the same or any part thereof to a sequestrator or receiver or trustees, as prayed for in paragraph five of plaintiffs' prayer for relief.

XVIII.

I deny that this Honorable Court has any jurisdiction, or any legal or equitable power or authority to restrain me from alienating or encumbering my individual one-tenth interest in the properties of the Fayette Coke Company or the Shamrock Supply Company, as prayed for by plaintiffs in paragraph sixth of their prayer for relief.

I therefore pray the Court:

1.

That I be hence dismissed with costs.

CHARLES E. LENHART.

COMMONWEALTH OF PENNSYLVANIA,
County of Fayette, ss:

Charles E. Lenhart being duly sworn according to law says the statements of the foregoing answer are true and correct to the best of his knowledge and belief.

CHARLES E. LENHART.

Sworn and subscribed before me this 6 day of ——, A. D., 1910.

WM. McCLELLAND,
Prothonotary.

Endorsement: No. 618—In Equity—In the Court of Common Pleas of Fayette County, Pennsylvania—Between Josiah V. Thompson, Trustee, &c., et al., Plaintiffs, and Gerald Purcell Fitz Gerald et al., Trustees, &c., Defendants—Separate Answer of Charles E. Lenhart, Trustee—Filed Dec. 6" 1910—Johnson & Rush Solicitors for Defendant, Charles E. Lenhart—Printer's charges $17.00

117 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

Between
JOSIAH V. THOMPSON, Trustee, et al., Plaintiffs,
and
GERALD PURCELL FITZ GERALD, CHARLES E. LENHART et al.,
Defendants.

Replication to Separate Answer of Defendant Charles E. Lenhart.

The plaintiffs join issue on the matters alleged in the answer.

GUGGENHEIMER, UNTERMYER & MARSHALL,
HOWELL, STURGIS & MORROW,
Solicitors for Plaintiffs.

Endorsement: Equity No. 618—In the Court of Common Pleas of Fayette County, Pennsylvania—Between Josiah V. Thompson, Trustee, et al., Plaintiffs, and Gerald Purcell Fitz Gerald and Charles E. Lenhart, et al., Defendants—Replication to Separate Answer of Defendant Charles E. Lenhart—Filed Dec. 9″ 1910—Guggenheimer, Untermyer & Marshall, Howell, Sturgis & Morrow, Solicitors for Plaintiffs—Printer's charges $3.00.

118 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

Between
JOSIAH V. THOMPSON, Trustee, et al., Plaintiffs,
and
GER(LD PURCELL FITZ GERALD, CHARLES E. LENHART, et al.,
Defendants.

Replication to Separate Answer of Defendant Gerald Purcell Fitz Gerald.

The plaintiffs join issue on the matters alleged in the answer.

GUGGENHEIMER, UNTERMYER & MARSHALL,
HOWELL STURGIS & MORROW,
Solicitors for Plaintiffs.

Endorsement: Equity No. 618—In the Court of Common Pleas of Fayette County, Pennsylvania—Between Josiah V. Thompson, Trustee, et al., Plaintiffs, and Gerald Purcell Fitz Gerald and Charles E. Lenhart et al., Defendants—Replication to Separate Answer of Defendant Gerald Purcell Fitz Gerald—Filed Dec. 9″ 1910—Guggenheimer, Untermyer & Marshall, Howell, Sturgis & Morrow, Solicitors for Plaintiffs—Printer's charges $3.00.

119 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

Between
JOSIAH V. THOMPSON, Trustee, etc., et al., Plaintiffs,
and
GERALD PURCELL FITZ GERALD et al., Defendants.

Answer of Josiah V. Thompson, Trustee, to Interrogatories of the Defendant Gerald Purcell Fitz Gerald.

First. A clerical error was made in paragraph XII of the Bill in stating the amount of the trust fund then accumulated to be $39,990.00. The correct amount is $34,368.27, of which $32,594.51 is principal and $1,773.76 is accumulated income. It was received by the trustees at the several times and in the several amounts following:

Principal.

January 16, 1908	$5,781.41
February 25, 1908	7,500.00
July 25, 1908	597.56
February 27, 1909	4,934.87
February 27, 1909	1,050.79
July 15, 1909	3,053.15
January 26, 1910	9,676.73

Interest.

Feb. 15, 1909, from J. V. Thompson	796.88
Nov. 22, 1909, from J. V. Thompson	796.88
Nov. 22, 1909, from G. P. Fitz Gerald	180.00
Total	$34,368.27

On Nov. 26, 1910, the said G. P. Fitz Gerald has made an additional payment of $360 interest.

Further answering the first interrogatory, I have personally borrowed a part of this fund and so have each of the other trustees Gerald Purcell Fitz Gerald and Charles E. Lenhart.

120 Second. Answering Interrogatory 2, I borrowed $5781.41 February 4, 1908, and gave my personal note drawing six per cent interest, and deposited as collateral securety therefor $10,000 of the first mortgage bonds of the Pittsburg-Westmoreland Coal Company, and on February 25, 1908, I borrowed $7,500, giving my note drawing six per cent interest and deposited as collateral security therefor $12,000 of the same series of bonds. On May 6, 1909, Gerald Purcell Fitz Gerald personally borrowed $6,000 of said funds,

giving only his personal note therefor, and on March 3, 1910 Charles E. Lenhart personally borrowed $14,000 of said fund, giving only his personal note therefor.

Third. Answering Interrogatory 3, the money so borrowed by me was used in my general business. No part of it was invested in the purchase of real estate, leases or other property.

Fourth. I am advised that my answer to Interrogatory 3 makes it unnecessary for me to answer Interrogatory 4.

COMMONWEALTH OF PENNSYLVANIA,
County of Fayette, ss:

Josiah V. Thompson, being duly sworn according to law, says that the foregoing answers are true.

JOSIAH V. THOMPSON.

Subscribed and sworn to before me this 12th day of December, 1910.

CHARLES T. CRAMER. [SEAL.]
Notary Public.

My Commission Expires Jan. 19, 1911.

Endorsement: No. 618—In Equity—In the Court of Common Pleas of Fayette County, Pennsylvania—Between Josiah V. Thompson Trustee, etc., et al., Plaintiffs, and Gerald Purcell Fitz Gerald et al., Defendants—Answer of Josiah V. Thompson, Trustee to Interrogatories—Filed Dec. 12" 1910—Guggenheimer, Untermyer & Marshall, Howell, Sturgis & Morrow, Solicitors for Plaintiff, Josiah V. Thompson—Pr. charges $6.00.

121 In the Court of Common Pleas of Fayette County, Sitting in Equity.

No. 618.

Between
JOSIAH V. THOMPSON, Trustee, etc., et al., Plaintiffs,
and
GERALD PURCELL FITZ GERALD et al., Defendants.

Exceptions to Answer of Josiah V. Thompson.

Gerald Purcell Fitz Gerald, one of the defendants in above styled suit, by his counsel, excepts to the sufficiency of the answer of Josiah V. Thompson to the Third Interrogatory exhibited to said Thompson and filed in this suit November 30th, 1910, and, for cause of exception, says:

The said answer is not responsive to the Interrogatory. In part the Third Interrogatory reads:

"State how you used the sums of money so borrowed and personally used by you, and what benefits, profits or advantages you derived from such personal use of the money so used."

The answer to this reads:

"The money so borrowed by me was used in my general business,"

Thus entirely failing to answer the questions asked.

JAMES GAY GORDON,
MICHAEL J. RYAN,
WILLIAM A. STONE,
ROBINSON, McKEAN & MARTIN,
Solicitors for Gerald Purcell Fitz Gerald.

122 Endorsement: No. 618—In Equity—In the Court of Common Pleas of Fayette County, Pennsylvania.—Between Josiah V. Thompson, Trustee, etc., et al., Plaintiffs, and Gerald Purcell Fitz Gerald et al., Defendants—Exceptions of Gerald Purcell Fitz Gerald to Answer of Josiah V. Thompson, Trustee, to Interrogatories. Filed Dec. 27, 1910—James Gay Gordon, Michael J. Ryan, William A. Stone, Robinson, McKean & Martin, Solicitors for Gerald Purcell Fitz Gerald.

123 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

Between
JOSIAH V. THOMPSON, Trustee, etc., et al., Plaintiffs,
and
GERALD PURCELL FITZ GERALD et al., Defendants.

Supplemental Answer of Josiah V. Thompson, Trustee, to Interrogatories of the Defendant Gerald Purcell Fitz Gerald.

Answering Interrogatory 3, the money so borrowed by me was used in my general business. No part of it was invested in the purchase of real estate, leases or other property. The check to me for the $5781.41 was credited to my account in the First National Bank, Uniontown, Pa., February 4, 1908, and was all used toward payment of my check to George J. Elliott for $8000, which was given to pay my note given George J. Elliott two years prior. The $7500 was credited to the same account in said bank February 25, 1908 and used to pay my checks of same day to S. J. Harry for $3300 to pay my note to him given five months before, and my check of same day to P. A. Johns, Sheriff, for $4219.95 to satisfy Fi. Fa. No. 72 March Term 1908 E. D. Amanda J. Rankin's Ex'r vs. J. R. Barnes. The money being advanced as a loan to James R. 124 Barnes, from which I received no profit other than legal interest. I repaid to the trustees herein all of said sums so borrowed with interest, on December 13, 1910. The amount so paid being $13939.15, which with $796.88 interest paid by me February 15, 1909, as stated in my answer to the first Interrogatory, is in full thereof with interest.

JOSIAH V. THOMPSON.

COMMONWEALTH OF PENNSYLVANIA,
County of Fayette, ss:

Josiah V. Thompson, being duly sworn according to law, says that the foregoing answers are true.

JOSIAH V. THOMPSON.

Subscribed and sworn to before me this 28th day of February, 1911.

CHARLES T. CRAMER, [SEAL.]
Notary Public.

My Commission Expires Jan. 11, 1915.

Endorsement: No. 618—In Equity—In the Court of Common Pleas of Fayette County, Pennsylvania—Between Josiah V. Thompson, Trustee, etc., et al., Plaintiffs, and Gerald Purcell Fitz Gerald et al., Defendants—Supplemental Answer of Josiah V. Thompson, Trustee, to Interrogatories—Filed Febry. 28″ 1911—Guggenheimer, Untermyer & Marshall, Reppert, Sturgis & Morrow, Solicitors for Plaintiff Josiah V. Thompson—Pri. charges $6.00.

125 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

Between
JOSIAH V. THOMPSON and Others
and
FITZ GERALD and Others.

The plaintiffs, by their solicitors, respectfully request the court to make the following findings of fact:

I.

That the plaintiff Lida Eleanor Purcell Fitz Gerald is and was at all times referred to in the Bill of Complaint, a citizen of the state of Pennsylvania, having her domicil at Uniontown, in said county.

Ans. Affirmed as to her residence or citizenship at the times and dates of the happening of the material and relevant matters averred in the bill as the occasion of this proceeding.

II.

That the plaintiff Josiah V. Thompson is and was at all such times a resident of Uniontown, Fayette county and state of Pennsylvania, and is one of the trustees under the agreement of December 6, 1906, hereinafter recited.

Ans. Affirmed.

III.

That at the time of the filing of the Bill of Complaint in this action, William McClelland, Prothonotary, was duly appointed by this court guardian ad litem of John Purcell Fitz Gerald, 126 Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald minor children named in said Bill, and has acted as such in this suit.

Ans. Affirmed.

IV.

That the defendant Gerald Purcell Fitz Gerald is and was at all the times mentioned and referred to in the Bill of complaint, a resident of the Island of Waterford, Ireland, and is and was at all of such times a subject of the United Kingdom of Great Britain and Ireland, and that at the time of the making of the agreement of December 6, 1906, and of the enactment of the Act of Parliament, and at the time of the filing of the Bill of complaint, and at all the times therein referred to, he was and still is the owner of the interests in the real property in said Bill described, within the jurisdiction of this court, and that he has ever since then continued to be and is now the owner of said interests in said property.

Ans. Affirmed.

V.

That at the time of the making of said agreement of December 6, 1906, and at the time of the filing of said Bill of complaint, and at all the times referred to in said Bill, the defendant Gerald 127 Purcell Fitz Gerald was and that he has been continuously since that time and still is also the owner in fee simple of a tract of land, about three hundred acres in extent, in the Island of Waterford, Ireland, in the United Kingdom of Great Britain and Ireland, and that he owned and still owns the building constructed upon said land, and occupied and still occupies the same as his home and residence; that at all of said times the said defendant Fitz Gerald also owned and still owns in fee simple a tract of land in or near the city of Manchester, England, in the United Kingdom of Great Britain and Ireland, consisting of improved and unimproved property, and that at the time of the making of said agreement of December 6, 1906, and at the time of the passage of the Act of Parliament and of the filing of said Bill and at all the times mentioned therein, he was and still is in the receipt of a net income of not less than two thousand pounds per annum from the improved portion of said Manchester property.

Ans. Affirmed, except as to the present net income from the improved portion of the property in or near Manchester, England, regarding which there is evidence or it is set forth in admission that the present net income is materially less than 2000£ per annum.

VI.

That the interest of the defendant Gerald Purcell Fitz Gerald in the Fayette Coke Company property described in the Bill of complaint was at the time of the making of the agreement of December 6, 1906, hereinafter recited, and of the passage of the Act of Parliament hereinafter referred to, and at the time of the filing of 128 the Bill, and at the time of the trial, of the value of not less than one million dollars; and that the interest of said defendant Fitz Gerald in the Shamrock Supply Company was at all of said times not less than fifty thousand dollars.

Ans. Affirmed, as to the amounts named being the value of the entire properties, nine tenths of which at the times named belonged to and was owned by the defendant, Gerald Purcell Fitz Gerald.

VII.

That the defendant Charles E. Lenhart is and was at all the times referred to in the Bill, and at the time of the trial, a resident of Menallen township, Fayette county, in the state of Pennsylvania; that he was at all of the times above referred to the manager of the Fayette Coke Company and of the Shamrock Supply Company, both of which were and are partnerships, and that the said Lenhart and the defendant Gerald Purcell Fitz Gerald were and are, together with the plaintiff Josiah V. Thompson, the trustees named in the agreement of December 6, 1906, hereinafter recited.

Ans. Affirmed.

VIII.

That the real property of the Fayette Coke Company described in the Bill of complaint was at the time of the making of the agreement of December 6, 1906, and ever since has been and is now owned by the defendants Gerald Purcell Fitz Gerald and 129 Charles E. Lenhart, as a partnership, the defendant Fitz Gerald owning an undivided nine-tenths interest therein and the defendant Lenhart an undivided one-tenth interest therein, and that there is and was during all of said times operated upon said property and by the said partnership, a coke plant.

Ans. Affimed.

IX.

That the property of the Shamrock Supply Company was and is, in like manner and in the same proportions, owned by the said defendants Fitz Gerald and Lenhart, as a partnership, and that the said Shamrock Supply Company at all of said times operated and now operates a general merchandising store at the coke works of the Fayette Coke Company aforesaid.

Ans. Affirmed.

X.

That by agreement, in writing and under seal, dated December 6, 1906, and recorded August 1, 1910, in Agreement Book Vol. 22, page 304, in the Recorder's office of Fayette county, aforesaid, the defendant Gerald Purcell Fitz Gerald and the plaintiff Lida Eleanor Purcell Fitz Gerald duly and lawfully agreed with each other, and with the plaintiff Josiah V. Thompson and the defendants Charles E.

Lenhart and Gerald Purcell Fitz Gerald as trustees, as set
130 forth in the copy of said contract, contained within Paragraph Eight of the Bill of complaint.

Ans. Affirmed.

XI.

That said Act of Parliament, in the terms of the Act annexed to the answer of the defendant Fitz Gerald as Exhibit No. 1, dissolving the marriage between the defendant Gerald Purcell Fitz Gerald and the plaintiff Lida Eleanor Purcell Fitz Gerald as of the 26th day of July, 1907, was duly and regularly passed on said last mentioned date; that thereafter and on the 31st day of July, 1907, the defendant Gerald Purcell Fitz Gerald remarried, and has one child now living, as the issue of said subsequent marriage.

Ans. Affirmed.

XII.

That pursuant to the provisions of the aforesaid agreement of December 6, 1906, and until the 23rd day of June, 1910, the profits arising from the operation of the said Fayette Coke Company and said Shamrock Supply Company, in so far as the same were required to be paid under the terms of said agreement, were so paid and distributed by the defendant Lenhart according
131 to the provisions of said agreement and in accordance with the rights of the various parties interested thereunder, the proper portion thereof having been annually and regularly paid to the trustees named in said agreement for the benefit of the plaintiff Lida Eleanor Purcell Fitz Gerald, and another portion thereof paid to said trustees toward the accumulation of the three hundred thousand dollar fund held for the children of said Gerald Purcell Fitz Gerald and Lida Eleanor Purcell Fitz Gerald, and for the plaintiff Lida Eleanor Purcell Fitz Gerald.

Ans. **Affirmed.**

XIII.

That on the 23rd day of June, 1910, the defendant Lenhart by instruction of the defendant Fitz Gerald, duly notified the said Thompson, Lenhart and Fitz Gerald as trustees under the aforesaid agreement of December 6, 1906, that he had been instructed by the defendant Fitz Gerald, as the business manager of the latter, not to pay to the said trustees the amounts that would become due on June 30, 1910, under said agreement; and the said Lenhart accordingly refused and has continued to refuse, and the defendant Fitz Gerald likewise refused and has continued to refuse to make any payments under the said agreement since June 23, 1910; so that the payments that became due on June 30, 1910, under said
132 agreement, and all subsequent payments, are unpaid.

Ans. Affirmed.

XIV.

That the defendant Gerald Purcell Fitz Gerald has violated his trust, in that he has, ever since June 23, 1910, repudiated the aforesaid agreement of December 6, 1906, and declared the same illegal and void and not binding upon him, and in that he has forbidden the defendant Lenhart, as his manager, to pay over to the trustees any part of the profits from the aforesaid properties, and has refused to make any such payments, and has rendered it impossible for the trustees to receive or to pay over to the parties entitled thereto, the sums contemplated and set apart by the terms of said agreement; and in that he refused and has continued to refuse, as one of the said trustees, to receive, apply or pay over to said trust fund any of the said income as provided in said agreement, and thereby prevents the execution of the trusts and refuses to perform his duties as prescribed in said trust instrument.

Ans. Affirmed.

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XV.

The trustees had received, pursuant to the terms of the aforesaid agreement, up to June 23, 1910, the sum of Thirty-four thousand three hundred sixty-eight and 27/100 dollars ($34,368.27) on account of the fund of three hundred thousand dollars directed to be accumulated by them.

Ans. Affirmed.

And the plaintiffs, by their solicitors, respectfully request the court to find the following conclusions of law:

1. That the agreement of December 6, 1906, is in all respects valid and enforcible, and that there is payable to the trustees named therein, for the benefit of Lida Eleanor Purcell Fitz Gerald, the installments that have become due from and including the installments that became payable on June 30, 1910, to and including the installment that became due on December 31, 1910, to the extent to which the same have been earned, to-wit: to the amount of $16,460.00; and the trustees are entitled to a lien upon the interest of the defendant Fitz Gerald in the property of the Fayette Coke Company and to sequestrate his interest therein for the payment of said sum and of interest thereon from December 31, 1910; 134 and to a lien upon said interest and to sequestrate the same for the satisfaction of any sums that may hereafter become payable under said agreement of December 6, 1906.

Ans. Affirmed.

2. That the total share of the net profits of the defendant Fitz Gerald from the operation of the Fayette Coke Company property for the six months ending December 31, 1910, is the sum of Eight thousand nine hundred sixty and 11/100 dollars ($8960.11), and that there is therefore nothing payable for said term of six months from said property or the profits thereof on account of the said trust fund of three hundred thousand dollars, after satisfaction of the claims of the trustees under paragraph two of the said agreement of December 6, 1906, in favor of Lida Eleanor Purcell Fitz Gerald.

Ans. Affirmed.

3. That the aforesaid agreement of December 6, 1906, constitutes an equitable lien upon the interest of the defendant Fitz Gerald in the real property of the Fayette Coke Company described in the Bill, and in the profits and income derived from the operation thereof, for the benefit of the beneficiaries under the aforesaid agreement, to the extent of the payments therein provided for and to secure the payment of the sums by said agreement required to be paid.

Ans. Affirmed.

135 4. That the defendant Gerald Purcell Fitz Gerald be and he is hereby removed from his office as trustee under the aforesaid agreement of December 6, 1906; and upon it appearing to the court that Josiah V. Thompson and Charles E. Lenhart are unable to agree upon a trustee in place of said Fitz Gerald, the vacancy caused by his removal shall be filled by the court.

Ans. Affirmed.

5. That the said defendant Fitz Gerald account for and pay over to the trustees now in office and to the trustee to be appointed under the judgment or order to be entered hereafter in this action, all sums of money in his hands or for which he is accountable as trustee under the aforesaid agreement of December 6, 1906, and that the judgment to be entered upon these findings shall provide for the appointment of a Master or Referee to take and state the accounts of said defendant and that upon the coming in of such report judgment may be entered and enforced for the amount found due on such accounting.

Ans. Affirmed.

136 6. That the defendant Fitz Gerald should be restrained and enjoined by the judgment to be entered in this action from in anywise alienating, encumbering or otherwise disposing of his interest in the property of the Fayette Coke Company, unless and until there shall first have been accumulated in the hands of the trustees under the said agreement of December 6, 1906, the sum of three hundred thousand dollars, as provided by Paragraph Third of the said agreement.

Ans. Affirmed.

7. That the plaintiffs are entitled to costs of the action and to their disbursements against the defendant Fitz Gerald individually.

Ans. Affirmed.

Endorsement: #618 In Equity—Thompson et al. vs. Fitz Gerald et al.—Pl'ffs' Requests for Findings of Fact and Conclusions of Law—Filed March 15, 1911.

137 In the Court of Common Pleas of Fayette County, Sitting in Equity.

No. 618.

FITZ GERALD
vs.
FITZ GERALD.

The defendant, Gerald Purcell Fitz Gerald, requests the Court to make the following

Findings of Fact.

I. The contract of December 6, 1906, in which the plaintiffs seek equitable relief as prayed for, was made on the day after the day when the plaintiff Lida Eleanor Purcell Fitzgerald obtained the decree of divorce a mensa et thoro from the defendant Gerald Purcell Fitz Gerald, and by its terms is an agreement upon the part of the plaintiff Lida Eleanor Purcell Fitz Gerald to proceed after the date of the said contract to procure by an act of Parliament a divorce a vinculo matrimonii and upon the part of the defendant Gerald Purcell Fitz Gerald is an agreement to pay his said wife in case of and when she obtained such an absolute divorce by act of Parliament, and in consideration for such action on her part, an annuity of three thousand pounds for three years and of four thousand pounds yearly thereafter for the term of her natural life. The said contract by its terms was to become operative so far as the payment of the said annuities is concerned only if she did proceed to obtain and did obtain such absolute divorce.

Ans. Refused.

138 II. The marriage of the said Lida Eleanor and the said Gerald Purcell Fitz Gerald was contracted in the United States at Los Angeles, California, on the 1st day of March, 1899, and after the solemnization of the said marriage they lived together as man and wife. On the 16th day of February, 1906, the husband began a proceeding against his said wife for a divorce a mensa et thoro in the Irish Courts upon the ground of adultery. Subsequent thereto, to-wit, on the 21st day of February, 1906, the wife began a proceeding for a like divorce against her husband on the ground of adultery, cruelty and desertion. By an order of the Court these two proceedings were joined and were proceeded with and on the 5th day of December, 1906, both cases came on for trial, on which said date the husband through his counsel, in open Court, abandoned his proceeding for divorce, and a decree in accordance with said abandonment was entered, dismissing his petition. Thereupon the Court proceeded to hear the petition of the wife and in said proceeding the counsel for the defendant Gerald Purcell Fitz Gerald did in open court state to the trial Judge that the defendant would not contest the wife's petition for a divorce if the cause of divorce was confined to two grounds, viz: adultery with a person unknown and

cruelty, but that if the said wife, in her said petition, proceeded to establish any other ground or fact as a reason for said divorce the petition would be confessed, whereupon the said wife did proceed with her case upon the two grounds only, and on the 5th day of December did obtain a judgment and decree of the said Court divorcing her from her said husband a mensa et thoro. The
139 contract sued upon was executed by the parties on the day following the said decree.

Ans. Affirmed as qualified (1) by what is set forth in Plaintiffs' Ex. #4 being exemplification of record of the trial in the High Court of Justice in Ireland (2) there is no evidence that the two proceedings were joined by order of court.

III. During the pendency of the said action by the wife for divorce she did apply to the said Court for alimony pendente lite and did obtain an order granting her alimony in the sum of one hundred pounds a month. She did not apply for any permanent alimony and the decree of divorce a mensa et thoro did not award her any alimony.

Ans. Refused under the evidence.

IV. The contract sued upon was not submitted to the said Court or any judge thereof for his approval, and there is no evidence that the agreement of December 6, 1906, was at any time
140 brought to the knowledge of the said Court or any judge thereof.

Ans. There being no evidence submitted on the subject one way nor the other this request is refused.

V. At the date of the said contract the said wife had not begun any proceeding to obtain a divorce a vinculo matrimonii by act of Parliament and at the date of the said contract the marriage relation between the said parties still subsisted except as to the effect of the decree of divorce from bed and board.

Ans. Affirmed.

VI. After the execution of said contract, to-wit, on the 4th day of March, 1907, the said plaintiff wife did present her petition to Parliament setting forth the fact that she had obtained a divorce a mensa et thoro and praying for an absolute divorce from the bonds of matrimony upon the ground of adultery upon the part of her husband with a person unknown and of his cruelty to her, the said grounds of divorce being in accordance with the stipulations and agreements made in open court by the counsel for the husband when the divorce a mensa et thoro was obtained. On the hearing of the said petition in Parliament the counsel for the said wife did read to the committee of the House of Lords, to which her petition had been referred, the statement of her husband's counsel in
141 the Irish Court wherein he said that the husband would not contest the divorce if the charges of the wife were confined to those of adultery with a woman unknown and cruelty.

Ans. The evidence does not warrant a finding that the said grounds of divorce were in accordance with the stipulations and agreement made in open court by the counsel for the husband when the divorce a mensa et thoro was obtained, the said request is therefore refused.

VII. In consequence of said proceedings and petition by the said wife to Parliament an act of Parliament was passed and received the Royal assent on the 26th day of July, 1907, granting the said wife a divorce from her said husband a vinculo matrimonii.

Ans. Affirmed.

VIII. The said husband and wife being citizens of Ireland could not obtain a divorce a vinculo matrimonii otherwise than by petition to Parliament and by an act of Parliament granting such divorce.

Ans. Affirmed.

IX. The act of the husband in withdrawing his proceedings against the wife in the Irish Court and in admitting the allegation
by the wife in her proceding in divorce for adultery with a
142 person unknown and of cruelty and in not contesting said
wife's proceeding was in consequence and in pursuance of the agreement between him and her made before the trial of the said cause.

Ans. Refused under the evidence.

X. The said agreement between the said husband and wife as to said actions for divorce in the Irish Court and the said acts of the said husband and wife in the said proceedings consequent upon said agreement were part of the consideration for the contract of Dec 6, 1906, upon which the plaintiffs found their action.

Ans. Refused under the evidence.

XI. The proceeding by the wife by petition to Parliament to procure an act of Parliament dissolving the marriage relation was in consequence of the contract made by them on the 6th day of Dec. 1906, and was an indispensable consideration for the payment of the annuities and other sums of money for which the plaintiffs ask a decree of this Court.

Ans. Affirmed as qualified by our Finding of Fact and Conclusions of Law filed herewith.

143 XII. The contract of Dec. 6, 1906, upon which the plaintiffs sue was in contemplation of said husband and wife and the procurement of the said act of Parliament dissolving the marriage relation was intended and contemplated and agreed to by the husband and wife on the 5th day of December 1906, when the case of the said wife for divorce came on to be heard and when she obtained the decree of divorce a mensa et thoro, and the said contract of Dec. 6, 1906, was a written ratification of the agreement previously made by the said husband and wife to that effect

Ans. Refused under the evidence.

XIII. The plaintiffs have offered no evidence to contradict the averments of fact contained in the defendant's Answer.

Ans. The reasons for the refusal of this request appear in our first Conclusion of Law.

144 XIV. The plaintiffs have not contradicted by two witnesses nor by one witness and corroborating facts or circumstances the following averment of the defendant's Answer: "VIII. I admit

that the agreement set out in paragraph 8 of plaintiff's Bill dated Dec. 6, 1906, between the plaintiff Lida Eleanor Purcell Fitz Gerald and myself, is a correct copy of the agreement so made between plaintiff and myself; but I deny that the said agreement was made for 'divers good and valuable considerations' as averred by plaintiffs, but aver that the considerations for the said agreement were not good and valuable but were unlawful and fraudulent considerations against public policy, as hereinafter set forth in paragraphs 13, 14, 15 and 16 of this Answer."

Ans. Same as XIII supra.

XV. The plaintiffs have not contradicted by two witnesses or by one witness and corroborating circumstances the following averment of the defendant's Answer: "On the 16th day of February, 1906, I then being a British subject domiciled in Ireland, did file in His Majesty's High Court of Justice in Ireland, King's Bench Division (Matrimonial) a petition praying said Court to decree a divorce a mensa et thoro from my then wife, the said plaintiff, Lida Eleanor Purcell Fitz Gerald, wherein I did charge my said wife with adultery. On the 21st day of February, 1906, my said
145 wife, Lida Eleanor Purcell Fitz Gerald did file in the said
High Court of Justice her petition against me, wherein she prayed for a divorce a mensa et thoro, and in which petition she did charge me with the offenses of adultery and cruelty. The said causes were proceeded with and Bills of Particulars were filed by each of us in our said suits under orders of the said Court, setting forth the particulars of said offenses so charged. During the said litigation, to-wit: on or about the 3rd day of September, 1906, my said wife and I did agree as follows:

That I would withdraw my petition for a divorce against her, and that I would not contest her petition for divorce, but would admit the said charges of adultery and cruelty and facilitate her in procuring said divorce a mensa et thoro in said Irish Court, and that upon procuring such decree, as absolute divorces are not granted under the Irish Law, she would proceed to apply for and secure an act of Parliament, declaring an absolute divorce from the bonds of matrimony between her and me. In compliance with and pursuant to said agreement, I did on the 5th day of December, 1906, withdraw my said action for divorce and the charges therein against my wife and did not contest my said wife's petition for divorce, and did make the admissions heretofore referred to. In consequence thereof, on the 5th day of December, 1906, my said wife obtained a decree of said court divorcing her a mensa et thoro. On the succeeding day, to-wit: Dec. 6, 1906, in further pursuance of said agreement heretofore referred to, and in consideration of the said acts on her part and my part referred to, the contract or agreement set forth in plaintiff's Bill, and which is the foundation of these proceedings, was entered into between her and me, the further consideration for said agreement on her part being, as set forth therein, the procurement by my said wife of an act of Parliament
146 divorcing her and me. I particularly call the attention of the
Court to the second clause of said agreement, as set forth in

plaintiffs' Bill wherein the said consideration is set forth in the following language:

(*a*) "2. As from the date of the passage of the act of Parliament dissolving the marriage of the said husband and wife, and in consideration of the premises, the husband will pay to the trustees in trust, &c." and I call the attention of the Court to the third paragraph of the said agreement or contract, wherein the consideration for the same is again set forth in the following language:

(*b*) "3. For the consideration aforesaid, the husband will also pay to the trustees out of the balance of his nine-tenths (9/10's) share of the said profits arising out of the two companies named above, to be paid to and collected by the trustees from time to time from the passing of the said act of Parliament in manner as follows, to-wit:"

and I call the attention of the Court to clause eleven of the said contract or agreement wherein it is provided as follows:

(*c*) "11. It is hereby agreed by and between the husband and wife that the following provisions relating to their children shall take effect from the time of the passing of the said act of Parliament, &c."

14. At the time that the said agreement was so as aforesaid entered into, to-wit; December 6, 1906, the said act of Parliament had not been passed or applied for, but thereafter, the said plaintiff, Lida Eleanor Purcell Fitz Gerald, did, in the pursuance of said agreement or contract so, as aforesaid, entered into with me, make her petition and complaint to His Majesty, the King of Great Britain and Ireland, that an act might be passed "by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons" in Parliament assembled, divorcing her, the said Lida Eleanor Purcell Fitz Gerald from the bonds of matrimony existing between her and me her husband, and wholly dissolving, annulling vacating and making void the same, and in consummation of said agreement and of the performance upon her part of the consideration for the said agreement she did procure the passage by Parliament of said absolute
147 divorce, to-wit: on the 26th day of July, 1907. A true
copy of the said act of Parliament is hereto annexed and marked "Exhibit I".

15. I aver that the said agreement or contract set forth in the plaintiffs' Bill, and which is the foundation of the present proceeding and the covenants and conditions thereof sought to be enforced by this present action, were by the terms of the said contract to become operative only in the event of and when the said Lida Eleanor Purcell Fitz Gerald obtained the passing of said act of Parliament.

16. I aver that all the foregoing facts were fully known to the plaintiff Josiah V. Thompson, who is the uncle of the said Lida Eleanor Purcell Fitz Gerald, and that in the making of the said agreement, and all the acts and negotiations leading thereto, the said Thompson, acting for his said niece, did instigate, induce and

procure the said agreement to be entered into by my said wife and myself."

Ans. The parts of the answer quoted are not responsive to the bill so as to bring them within the rule requiring that they be contradicted by two witnesses or by one witness and corroborating facts, the said request is therefore refused.

XVI. The said averments of defendant's Answer as contained in Findings No. 13, 14, and 15, are therefore found to be true.

Ans. Refused.

148 The defendant Gerald Purcell Fitz Gerald requests the Court to state the following:

Conclusions of Law.

I. A contract between husband and wife for the payment of money founded in whole or in part upon the consideration that the wife shall proceed to obtain a divorce dissolving the marriage relation is null and void.

Ans. Affirmed, provided such contract is collusive or against public policy but in our opinion the contract in question is neither collusive nor against public policy.

II. A contract between husband and wife for the payment of money to become operative only when and if a divorce from the bonds of matrimony is obtained is null and void.

Ans. Same as I. supra.

III. An agreement between husband and wife for the payment of money founded in whole or in part upon the consideration that one of the parties thereto shall in an action of divorce by the other admit the grounds of divorce or not contest the prosecution of said action for divorce or facilitate the said divorce is null and void.

Ans. Same as I. supra, with the further qualfication: We are aware of no law, where there is good, valid and legal cause for divorce, that requires the respondent to contest, if he has no 149 defense; under such circumstances it would certainly be more creditable to and honorable in a respondent to admit or not contest or facilitate—provided not collusively—than it would be to contest or attempt to do so by perjuring himself or endeavoring to secure others to do so for him. The vice incident to such proceeding is where there is collusion, of which there is no proof in this case.

IV. An agreement between husband and wife for the payment of money made during the pendency of a proceeding for divorce and to become operative after the said divorce is obtained and only after said divorce is obtained is null and void.

Ans. Same as I. supra.

V. An agreement between husband and wife for the payment of money after a decree of divorce a mensa et thoro was obtained by the wife whereby the husband stipulates that he will pay an annuity of three thousand pounds for three years and four thousand pounds a year during the natural life of the wife if and when she shall obtain an absolute divorce from the said husband is against public policy and null and void.

Ans. Same as I. supra.

VI. The agreement sued upon by the plaintiffs in this case dated Dec. 6, 1906, is null and void as being founded upon the
150 consideration that there shall be obtained by the wife an
act of Parliament divorcing her from the bonds of matrimony with her husband, said contract being against public policy.

Ans. Refused.

VII. The separate answer of the defendant Gerald Purcell Fitz Gerald is responsive to the plaintiffs' Bill in its 8th, 13th, 14th, 15th and 16th paragraphs, and being so responsive the burden was upon the plaintiffs to overcome it by two witnesses or by one witness and corroborating facts and circumstances, and the plaintiffs not having done so it stands as true.

Ans. Refused.

VIII. The averments contained in the said defendant's separate answer in paragraphs 8, 13, 14, 15, and 16, being true as found in the foregoing finding constitute a complete defense to the plaintiff's right to the relief asked for and the contract sued upon by the plaintiffs is null and void and cannot be enforced in this action.

Ans. Refused.

151 IX. Under the findings of fact and the findings of law
made by the Court the bill must be dismissed.

Ans. Refused.

X. The contract of December 6, 1906, which is the foundation of the plaintiffs' bill do not constitute an equitable assignment of the profits of the Fayette Coke Company and the Shamrock Supply Company or any part thereof or of the properties of the same, because the defendants Fitz Gerald and Lenhart or either of them, do not by said contract surrender possession and dominion over the said profits or properties or any part thereof, and the said contract is only a personal promise to pay upon the part of the said defendant Fitz Gerald the annuities and sums of money referred to in said agreement.

Ans. Refused.

XI. In interpreting the said contract and ascertaining the intent of the parties thereto their acts under the said contract since it was made are to be taken as the best evidence of their intent and
as since the execution of said contract the said parties have
152 treated it as a personal promise to pay and not as an ap-
propriation of the funds and surrender of the dominion
thereover by the said Fitz Gerald and the contract must be construed to be a mere formal promise to pay and not an equitable assignment of the fund and property or any part thereof.

Ans. Refused.

JAMES GAY GORDON,
MICHAEL J. RYAN,
WM. A. STONE,
H. L. ROBINSON,
Attorneys for Gerald Purcell Fitz Gerald.

Endorsement: No. 618—In Equity—Thompson et al. vs. Fitz Gerald et al.—Defendant's Request for Findings of Fact and Law—Filed March 15, 1911—Robinson, McKean & Martin, Attorneys at Law, Uniontown, Pa.

153 In the Court of Common Pleas of Fayette County, Penna., Sitting in Equity.

No. 618.

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitzgerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

Before His Honor Robert E. Umbel, P. J.

March 2d and 3d, 1911.

154 Appearances:

Mr. Samuel Untermyer, of Guggenheimer, Untermyer & Marshall, of New York City; Mr. George D. Howell and Mr. William J. Sturgis, appear as counsel for Plaintiffs.

Hon. James Gay Gordon, Mr. Michael Ryan, of Philadelphia; Mr. H. L. Robinson appear as counsel for the defendant Gerald Purcell Fitz Gerald; Mr. Frank P. Rush appears as counsel for the defendant Charles E. Lenhart.

Mr. RUSH: I want to interpose an objection on the part of Mr. Lenhart, one of defendants in the case proceeding to trial, in the state of the record at present; he is sued in three capacities—as Trustee, as Partner and as Manager of the Fayette Coke Company; he has answered as Trustee; he has demurred as Partner and Manager. We do not think in that state of the record that we have a right to force him to go to trial until that demurrer is disposed of, so that we may know what position we are defending here.

BY THE COURT: This is the first time the Court has heard of this demurrer, and we will proceed to trial subject to the demurrer. An exception is granted the defendant Charles E. Lenhart.

155 Mr. RYAN: I desire to have action taken by the Court. There are outstanding two commissions—one at the instance

of the plaintiffs, seeking the testimony of two English barristers; the other at the instance of the defendants, in which we have named as witnesses five English counsel—these commissions issued respectively on the 19th of January and on the 25th of February, 1911; ordinarily that might be subject to some criticism regarding the interval of time elapsing but there is nothing in the Bill filed by the plaintiffs that would require us at any time earlier than we did to issue such commission. There is no averment in the Bill that this contract, which is the subject of this litigation, should be interpreted by any other law than the law of the forum and the law of the place of performance which is, as we regard it, Pennsylvania, and there is nothing in the Bill alleging that the law of the place of the making of the contract differs in any way from the law of the forum or the law of the place of performance, so that this, if they seek to establish a foreign law differing from the law of the forum and the law of the place of performance, is a substantive fact which must be proved, and which they regard as essential, because they issued their commission. Until the 19th day of January we had no knowledge absolute—we had notice of the rule—but we had no knowledge absolute that they intended to execute their commission. 156 Then we acquaint our client, who, as your Honor will find from the record, is a resident of a foreign country, we get into communication with him, and on the first of the month I notified counsel, telling him of our intention to issue a commission, giving him four of the five names, and we entered our rule on the 4th of February, and they take twenty-one days, and the last of the twenty-one days, to file their cross interrogatories. Neither commission has been returned—ours, of course, could not be executed, whether or not theirs has been I have no official knowledge—in any event neither commission has been returned to this country. I take it that the issuance of a commission is a part of the proceedings; that unless there is undue delay, our decisions run, three months from the time of the issuing of a commission is not and has not been regarded as undue delay; when the testimony has to be taken in London eight months, it has been held, is not an undue delay. This is power that the Court has ever been known to exercise and always, always, the High Court of England has felt that a trial should be delayed until the return of the commission. We, of course, think there is no difference between the law of Great Britain and the law of Pennsylvania; if they think otherwise then we are entitled, sir, to have our commission returned before this cause is heard at all, and I move therefore for a continuance.

157 Mr. UNTERMYER: I do not understand from my associates that the practice in this state is that the mere issuing of a commission operates as a stay of the trial. It certainly does not in our state and I confess I quite fail to understand the point of my friend's remarks. He says his commission was issued for the purpose of procuring testimony to answer the commission issued by us—we are going to trial without our commission. That, I think, is a quite conclusive answer. If his depositions have been asked for for

the purpose of answering proof we have sought, we are going to trial without our commission.

Mr. Ryan: Do you mean, Mr. Untermyer, that you withdraw your rule for a commission?

Mr. Untermyer: I do not understand that that is necessary. We are going to trial without it.

By the Court: Do you expect to go to trial, to the conclusion of the hearing, without the commission?

Mr. Untermyer: Unless, your Honor, the commission is returned before the trial is concluded and then we reserve the right to offer that commission, and then that would be time for counsel on the other side to make any application that they may wish to
158 make. At the present stage of the proceedings it would seem, perhaps, to be a quasi abandonment.

Mr. Ryan: May it please the Court, we want no quasi abandonment or an abandonment with a string to it, if the commission is abandoned it must be absolute and if that is done we are willing to proceed to trial.

Mr. Untermyer: Upon further consideration we will abandon our commission, withdraw our rule and proceed to trial without the testimony of the English barristers, with the understanding that the defendants will do likewise.

Mr. Ryan: We are satisfied and ready to proceed with the trial.

By the Court: The rules then will be withdrawn and the commissions abandoned by counsel on both sides?

Mr. Untermyer: Yes.

Mr. Ryan: That is correct.

159 Mr. Untermyer: We offer in evidence the agreement of December 6, 1906, referred to at pages 4, 5, 6 and the following pages of the Bill of Complaint.

Judge Gordon: I exact that he produce the agreement.

Mr. Untermyer: The original agreement is upon the record and if desired we will have it brought from the record and substituted for the copy which we allege in our Bill and which is admitted by the defendant.

By the Court: The offer of the record will be sufficient.

Mr. Untermyer: The agreement is recorded in Agreement Book No. 22, page 304, in the office of the Recorder of Deeds for Fayette County.

Judge Gordon: I ask for the production of the original agreement.

Mr. Untermyer: We now offer in evidence a duly authenticated copy of an act to dissolve the marriage of Lida Eleanor Purcell Fitz Gerald with Gerald Purcell Fitz Gerald, passed by the Parliament of Great Britain the 26th day of July, 1907, with the accompanying certification of the United States Consul, being Exhibit No. 2.

160 Judge Gordon: We have no objection to the paper if it is a certified copy of the act of Parliament.

Mr. Untermyer: We now offer in evidence a like authenticated copy, under the seal of the Consul, of the minutes of the proceedings of the House of Lords, referring to Exhibit No. 2, of March 4, 1907, and the minutes of the proceedings of the House of Commons, referring to Exhibit No. 2, of April 11, 1907, being Exhibits 2A and 2B.

Judge Gordon: Subject to the right to make an objection to the completeness of the record, we will admit it.

Mr. Untermyer: Referring again to the offer made by us of the agreement of December 6, 1906, we now offer from book No. 22, page 304, of the records of Fayette County, the record of that agreement and in that connection I will call your Honor's attention to the admission on page 3 of the Answer—"I admit that the agreement set out in paragraph 8 of Plaintiffs' Bill, dated December 6, 1906, between the plaintiff Lida Eleanor Purcell Fitz Gerald and myself, is a correct copy of the agreement so made between plaintiff and myself; but I deny that the said agreement was made for "divers good and valuable considerations."

161 Judge Gordon: I object to the offer, first, because the Bill admitted, which contains a copy of this record, shows that it is not an instrument which could be recorded under our recording act, it not having been acknowledged by any of the parties thereto; further, that it is obligatory upon the other side to produce the original or to account for its absence.

By the Court: Under the admissions of counsel offering the agreement and the proof of the agreement for record, as embodied in the agreement itself, we will overrule the objection, with an exception for the defendants.

Mr. Untermyer: I now offer in evidence, duly authenticated, under the hand and seal of the American Consul for Great Britain, at Dublin, Ireland, the folowing documents: 1st, the judgment of the High Court of Justice of Ireland, King's Bench Division, before the Honorable Lord Chief Justice, Lord O'Bryan, in the case of Lida Eleanor Purcell Fitz Gerald vs. Gerald Purcell Fitz Gerald, on the 5th day of December, 1906, being Exhibit No. 3.

2d, a like authenticated record of the proceedings before the Lord Chief Justice resulting in the verdict, being Exhibit No. 4.

3d, the pleadings in the action referred to, being the Petition or Bill of Complaint, the Answer and the Bill of Particulars,

162 together with the notice of rejoiner of issue between the parties. The pleadings consisting of the Petition of Mrs. Fitz Gerald, the Answer of Gerald Purcell Fitz Gerald and the Rejoinder of the Petition in the suit against Mr. Fitz Gerald; also the petition of Gerald Purcell Fitz Gerald, the Answer of Mrs. Fitz Gerald and the Rejoinder by Mr. Fitz Gerald in the suit brought by him in the High Court of Justice in Ireland, being the suit referred to in the proceedings that have been offered, it appearing that both suits came to trial at or about the same time.

The petition or Bill of Complaint in the suit by Mrs. Fitz Gerald against Mr. Fitz Gerald, marked Plaintiffs' Exhibit No. 8.

The Answer by Mr. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 9.

The Bill of Particulars in the same suit, marked Plaintiffs' Exhibit No. —.

The Rejoinder by Mrs. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 10.

The notice of Rejoinder of issue in the same suit, marked Plaintiffs' Exhibit No. —.

The Petition in the suit brought by Mr. Fitz Gerald against Mr. Fitz Gerald, marked Plaintiffs' Exhibit No. 6.

The Answer by Mrs. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 5.

Rejoinder by Mr. Fitz eGrald in the same suit, marked Plaintiffs' Exhibit No. 7.

163 Judge Gordon: I do not know whether that is the complete record or not. Under the practice in this country a certification or exemplification of the record would be, under the certificate of the proper officer, that "the foregoing is the entire record of the proceedings as the same appears before us of record"; there is no such certificate here—each of these separate papers, one a transcript and certification of the pleadings, another a detached certification of the decree, being obviously not the exemplification of the record but the certificate of the clerk of court as to what the decree in effect, contains; these things are offered in this detached and incomplete fashion and I object to them unless there is evidence that they are the complete record, and it must be presented in its entirety or not at all. I object to it because of its physical incompleteness and detachment, so that your Honor is unable to say whether it is a complete record or not. This is a judicial proceeding in the High Court of Justice in Ireland—if anything is offered it must be all offered as the record and I object to this in its present form.

Mr. Untermyer: They are certified both by the Court and the shorthand writer to be the proceedings at the trial, and you will find that the proceedings are certified in like manner and the decree is also certified in like manner.

164 By the Court: We will allow them to be marked as exhibits and admitted, and will overrule the objection, with an exception for the defendants.

Judge Gordon: I offer to prove in support of my objection to the admission of these records that they do not constitute the whole record of the case of which they are a part.

Mr. Untermyer: Will counsel specify in what respect the records are incomplete?

Judge Gordon: The record is not complete in that it does not show all the testimony taken upon the issue in the case; it does not show the testimony taken by the plaintiff on commission to the United States; it does not show the abandonment of the proceedings and the period when the position of the parties as hostile litigants ceased, and the story and history of the litigation is not disclosed by this record.

Mr. Untermyer: Is it contended that any testimony taken on commission was offered as part of the proceeding at the trial of the action? Is it contended by counsel upon the other side that the ex-

hibit which has been offered as being a record of the proceedings at the trial is not a proper and correct record of what took place at the trial and the testimony that was there offered—is there
165 such contention?

Judge Gordon: There is the contention that Mr. Untermyer has no authority to determine how much of the record is relevant and how much is irrelevant. Your Honor must decide that. The assurance of a member of the Bar saying that he determines that he will leave out certain parts as being inconsequent and irrelevant——

Mr. Untermyer: Your Honor we object to this on the ground that the record appears to be, we believe it to be, and insist that it is, the complete record of the proceedings and of the decree and if it is not it lies with the other side to rebut the presumption raised by the certificate.

By the Court: For the present the objection is sustained, with an exception for the respondent.

Mr. Untermyer: Will it be admitted that the Fayette Coke Company property is and was at the time of the making of this agreement and the commencement of the action of the value of one million dollars, and will it be admitted that at such time the value of the Shamrock Supply Company was $50,000?

Judge Gordon: We will admit that at the time of the filing of the Bill and when the agreement was made that the Fay-
166 ette Coke Company was worth one million dollars and that the Shamrock Supply Company was worth $50,000.

Mr. Untermyer: May that be admitted as of the date of the execution of the agreement of December 6, 1906?

Judge Gordon: Yes, that will be admitted.

Mr. Untermyer: Will it also be admitted that at the time of entering into the agreement of December 6, 1906, the defendant Gerald Purcell Fitz Gerald was possessed in fee of real property at Waterford, Ireland, and in England at or near Manchester?

Judge Gordon: That will be admitted.

Mr. Untermyer: And that he also had improved real property in Great Britain upon which he was then receiving a net income of not less than 2000£ per annum?

Judge Gordon: The defendant Fitz Gerald admits that at the time of the execution of the contract offered in evidence, dated in December, 1906, he owned real property and personal property in the United Kingdom which realized him an income of £2000 a year.

167 Mr. Untermyer: Some improved real property, apart from the property at Waterford, Ireland, and apart from the unimproved property in Great Britain with respect to which the admission has already been made? The question is whether or not the defendant admits that he owned improved real property at or near Manchester, England, from which he realized an income of not less than £2000 per annum?

Judge Gordon: I will consult with my client during the noon recess and will then advise you as to that matter.

Mr. Untermyer: On page 28 of the Bill of Complaint will be found a letter from Mr. Lenhart to the Trustees with respect to which, by the pleadings, we are put upon our proof, is it admitted that that letter was written and sent to the Trustees on or about the day of its date, June 23, 1910?

Mr. Rush: We will admit nothing so far as Mr. Lenhart as Manager and Partner is concerned.

Judge Gordon: We will admit the averment of your Bill on that point.

Mr. Untermyer: I believe the amounts that have accumulated of the trust funds are admitted in the pleadings?

168 Judge Gordon: Yes.

Mr. Untermyer: And also the fact that since June 1910 no payments have been made?

Judge Gordon: It is admitted in the Answer and we admit it now.

Mr. Untermyer: We should like also an admission that from June 30, 1910, to the present time the Fayette Coke Company has made net earnings sufficient to entitle the plaintiff to the payment of the sums and installments referred to in paragraph 2 of the agreement, assuming the agreement to be legal.

Judge Gordon: I answer to that, that whatever installments have been due since June 1910, have been, under the agreement of the parties, paid into the hands of the Trustees and represent the amount due under the contract, assuming it to be legal. I cannot answer as to what the profits have been since the last audit of profits was taken but there have been profits, whether they would be sufficient to reach the $20,000 named in the contract I do not know. I am advised that they are not likely to be.

169 Charles E. Lenhart, sworn.

Examination by Mr. Untermyer:

Q. You are one of the defendants here?

A. I believe so.

Q. And one of the Trustees under the agreement here in question, dated December 6, 1906?

A. I am.

Q. And you are the partner of Mr. Fitz Gerald?

A. I am.

Q. And have been since 1906?

Judge Gordon: We object to that as incompetent and irrelevant.

By the Court: The objection is overruled; with an exception for the defendants.

Q. Will you be good enough to tell what have been the net profits of the earnings of the Fayette Coke Company property since June 30, 1910?

A. No, I can't tell you that.

Q. Can you give us any figures that would enable us to have on the record the amount of money that would be payable to Mrs. Fitz Gerald under this agreement?

A. Since June 1910, I couldn't tell you.

Q. Do you not have the figures somewhere?

A. I have them at our office.

Q. Can you get them here conveniently?

170 A. I could by this afternoon.

Q. Will you be good enough to get that for us, from June 30, 1910, and separate from Mr. Fitz Gerald's nine-tenths so as to let us know what his share of that was—from June 30, 1910, to December 31, 1910?

Afternoon Session.

Mr. UNTERMYER: During the morning session, your Honor, we introduced in evidence the agreement of December 6, 1906, from the record, and whilst we have no doubt as to the entire accuracy of the copies of those papers both upon the pleadings and the record, we have found the original and it might be just as well now to introduce the original and do away with any technical questions that might arise, and I accordingly offer the original document, market Plaintiffs' Exhibit No. 1.

CHARLES E. LENHART, recalled.

Examination by Mr. UNTERMYER:

Q. Mr. Lenhart, have you been able during the recess to get for us the information for which we asked?

A. Yes.

171 Q. Will you be good enough to state the net profits of the Fayette Coke Company, of which you and Mr. Fitz Gerald are owners and partners, from June 30, 1910, to December 31st, 1910?

A. According to the statement, $7,488.24 is due Mr. Fitz Gerald—his 9/10 per cent.

Q. His 9/10 per cent. of the net profits from that property for these six months is $7,488.24?

A. Yes, that was his 9/10, according to the audit.

Q. Is that all that has been applied.

A. That was all applied to Mr. Sturgis and Mr. Robinson.

Q. That is all that has been applied to this deposit under the terms of this agreement of December 6, 1906?

A. As to the six months, previous to that we paid it all over when you were here.

Q. Have you any data for the last two months?

A. No. For January it has been a loss—without taking an inventory and audit.

Q. There has been nothing during the six months from June 30, 1910, to December 31, 1910, applicable to the $300,000 fund?

A. No.

Q. And not enough to satisfy the other fund?

A. No.

Q. And from January or February there has been nothing applicable to either fund?

A. No. From the Shamrock Supply Company we paid $1417.81—that was Mr. Fitz Gerald's portion of the money.

172 Q. That was for the same six months—from June 30, 1910, to December 31, 1910?

A. Yes.

Q. That makes a total application from the two companies during that period of how much?

A. $8960.11.

Q. And that is all that is applicable?

A. That is all.

No cross-examination.

Mr. Untermyer. Will it be admitted that the defendant Fitz Gerald after the granting of this act of Parliament, now in evidence, remarried?

Judge Gordon: The defendant Fitz Gerald admits that he married his present wife on the 31st day of July, 1907, and that there is of that issue one child, born the 6th day of December, 1909.

Mr. Untermyer: Your Honor will observe that the act of Parliament was passed on the 26th day of July, 1907.

Is it admitted that the defendant at the time of the making of the contract of December 6, 1905, was the owner and that he continued to be the owner of an estate in Waterford, Ireland—"The Island"—consisting of his home—castle—with about three hundred acres of land?

173 Judge Gordon: It is admitted that at the time of the making of that contract he lived at the Island of Waterford in Ireland and that his home there consisted of about three hundred acres of land, with an ancient building, which was his home.

Mr. Untermyer: Is it admitted that he expended $500,000 on the ancient building?

Judge Gordon: No.

Mr. Untermyer: Is it also admitted that the defendant continues to be the owner of this property in Ireland from the time of making the contract up to the present time?

Judge Gordon: And that he is now the owner.

Mr. Untermyer: Is it further admitted that the defendant was at the time of making the contract and continued to be at the time of granting the Irish decree and the time of granting the Act of Parliament July 26, 1907, the owner of unimproved property at or near Manchester, in addition to the improved property there, from which he was deriving income?

174 Judge Gordon: It is admitted that he owned property both improved and unimproved at or near Manchester in England and that at that time his income from that property was about £2000, and that income has been since very much diminished and is now less than £500 a year.

Mr. Untermyer: I do not think I asked for the last admission. That is our case, your Honor.

Judge Gordon: May it please the Court, I move to dismiss the

Bill in this case, and I desire to present my reasons for so moving the dismissal of the Bill.

It is the law in Pennsylvania that a responsive answer, under oath, to a bill in equity must be overcome by the plaintiff by two witnesses or by one witness and corroborating circumstances. In this case we have filed such an answer and the plaintiff has offered no witness to overcome the answer of the defendant. We are therefore entitled to have this bill dismissd.

Court here adjourned to meet at nine o'clock A. M. March 3, 1911.

175 Morning Session, March 3, 1911.

Parties present as before.

After lengthy argument by counsel on both sides, the Court ruled as follows:

So far as they are pertinent and relevant, we do not seriously question the principles contended for by the defendants nor do we question the authorities cited by counsel in support of their motion to dismiss the Bill, yet, in our judgment, they do not apply to the special and particular facts of the case at bar and the motion to dismiss the Bill is therefore overruled and refused, with an exception for the defendants.

Judge GORDON: The defendants will offer no testimony.

Mr. UNTERMYER: Plaintiffs' counsel admit that no proof has been made sufficient to charge the defendant Lenhart in his capacity either as partner or as the Manager of the Fayette Coke Company or the Shamrock Supply Company, nor do they ask for his removal as Trustee upon the proof now before the Court, although the plaintiffs claim that a sufficient case has been made against the defendant Lenhart to hold him in the action in his capacity as Trustee.

By the COURT: In view of the statement of plaintiffs' counsel regarding the defendant Lenhart, the Court dismiss the action 176 against the said Lenhart-as partner and manager but not as Trustee.

Testimony closed.

I hereby certify that the proceedings in the above styled cause are contained fully and accurately in the notes taken by me on the trial thereof and that this copy is a correct transcript of the same.

ELIZABETH M. LEONARD,
Official Stenographer.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

ROBERT E. UMBEL,
President Judge.

Endorsement: No. 618 in Equity—Josiah V. Thompson et al. vs. Gerald Purcell Fitz Gerald et al.—Notes of Testimony—FiFled March 15" 1911—E. M. Leonard Official Stenographer, Uniontown, Pa.

177 In the Court of Common Pleas of Fayette County, Penna., Sitting in Equity.

No. 618.

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald; John Purcell Fitzgerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

178 *Opinion of the Court.*

The Requests for Findings of Fact and Conclusions of Law submitted to the Court by the parties in this case are sufficiently exhaustive and comprehensive that, with our answers thereto, we feel that we might properly omit further discussion and base thereon the decree we propose making and we would be glad to follow such course but under some of the dicta, amounting almost to requests or directions of our Appellate Courts in such matters and in view of the importance of the questions involved, we deem it our duty to set forth a chronological, connected Statement of Facts and give reasons a little more in detail and extenso for the faith we maintain, at least, in answering the following important legal questions, viz:

I. Is the answer of the defendant, Mr. Fitz Gerald, responsive to the Bill so as to bring it within the rule, requiring the plaintiff to overcome it by the testimony of at least two witnesses or one witness and corroborating circumstances?

II. Is the agreement of December 6, 1906, void, invalid and not enforceable as being collusive and against public policy?

III. If the said agreement of December 6, 1906, is good and valid does it create a lien, equitable or otherwise, on the property of the said defendant, Mr. Fitz Gerald, from the operation of which it is specifically provided the funds in question are to be derived?

IV. The defendant, Mr. Fitz Gerald, averring and insisting that the said agreement of December 6, 1906, is void and invalid, repudiating the trust and refusing to execute and perform his covenants, if the Court find and conclude that the said agreement is 179 good and valid, should the said defendant, Mr. Fitz Gerald, be removed as one of the Trustees and his place declared vacant?

We have been materially aided by the brief of plaintiffs' counsel;

defendants' counsel refused to submit anything but their Requests and their oral argument on the motion to dismiss plaintiffs' bill.

Finding of Facts.

March 1, 1899, at the Cathedral of St. Vibiana, in the city of Los Angeles, in the State of California, U. S. A., Lida Eleanor Niccols of Uniontown, Pa., was married to Gerald Purcell Fitz Gerald, a citizen of Ireland and a subject of the King of Great Britain, residing temporarily in the said United States.

From this union was issue three children, viz: John Purcell Fitz Gerald, born the latter part of 1899, and Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, twins, born October 24, 1900.

During the first year of their married life domestic differences and difficulties of a more or less serious nature between them began to appear and continued growing more serious as time passed; Mr. Fitz Gerald accusing his wife of adultery and other matters and Mrs. Fitz Gerald accusing her husband of adultery, cruelty and other grave misconduct. Matters progressed in such manner—bad becoming worse—until they separated in 1904, and some time thereafter Mrs. Fitz Gerald instituted, in the proper Court of England, a proceeding for divorce;

"Mr. Fitz Gerald challenged the jurisdiction of the English Court upon the ground that he was a domiciled Irishman and it being a matrimonial matter the English Court had no jurisdiction to entertain the claim.

180 Which contention was sustained by the English Court and the proceeding dismissed.

Immediately or soon thereafter, to wit: on February 16, 1906, Mr. Fitz Gerald instituted a proceeding in His Majesty's High Court of Justice in Ireland, King's Bench Division (Matrimonial) against Mrs. FitzGerald for divorce on the ground of adultery, and on February 21, 1906, Mrs. Fitz Gerald instituted in the same Court a proceeding against Mr. Fitz Gerald for divorce on the ground of adultery, cruelty and other indignities.

These cases were prosecuted in such manner that they both came on for trial before the Right Honorable Lord O'Brien, Lord Chief Justice of Ireland, and a City Special Jury on December 5, 1906, when and where both parties were represented by quite an array of eminent counsel. When the jury were empanelled and before they were sworn, Mr. Sergeant Dodd addressing the Court, (Pl'ffs' Ex. 4) said:

"My Lord, in this case, in which a petition has been presented by Mr. Fitz Gerald I appear with my friends Mr. Healy and Mr. Rosenthal as counsel for the petitioner, and before you proceed to have the jury sworn, I desire to state that I have considered the matters submitted to me in support of the petition of Mr. Fitz Gerald. I have I think, read every document and the details of the evidence which it was suggested might be given in proof, and I have arrived at the clear conclusion that it is my duty as leading counsel for Mr. Fitz Gerald, acting upon my own responsibility but with the full approval of my colleagues, Mr. Healy and Mr. Rosenthal and with the concurrence of my client to state that I have decided to offer no evidence in support of the petition. Of course that means that a decree may be given against Mr. Fitz Gerald in this suit."

Such an order was accordingly made dismissing the petition of Mr. Fitz Gerald, with costs.

On the other case, that of Mrs. Fitz Gerald against her husband, the said Sergeant Dodd of counsel for the respondent in that case, addressing the Court before the jury were sworn, said, inter alia, as follows, viz:

181 "There are several allegations in this petition, which, if the entire case was fought out might give rise to bitter controversy as to the character and conduct of persons who are not before the Court, and as to the personal honour of Mr. Fitz Gerald. If it is necessary that these matters should be proceeded with, it would be my duty to fight the case to the end. But even though the decision of the Jury and your Lordship might be adverse to the petitioner as to these matters, I am of opinion upon the instructions submitted to me, that there is enough left of the case of the petitioner to entitle her to the decree she claims.

"Mr. Fitz Gerald is not in a position to rebut some of the allegations of cruelty charged against him, and he admits that on the 17th of June, 1904, he was guilty of the offense charged, though not with the lady whose name has been erroneously mentioned in the petition. On these matters being proved or admitted—they are in fact admitted, for I am instructed to admit them—whatever the decision of the Jury as to the other allegations in the petition might be, the lady would be entitled to succeed and to obtain the relief she claims in her petition. Under these circumstances it would be deplorable to have a bitter and acrimonious struggle in relation to matters not material to the issue, and if the counsel for Mrs. Fitz Gerald are satisfied with our admissions on these issues I will not resist the case any further. I wish to say again that I adopt this course upon my own responsibility, but again I have the full approval of my colleagues, and the concurrence of my Client and his Solicitor."

In view of which Mr. Campbell, K. C., of counsel for Mrs. Fitz Gerald, addressing the Court, said, inter alia:

"I feel myself placed my Lord, in a somewhat difficult position owing to the course that has been taken by my learned friend Sergeant Dodd. I think your Lordship will give me credit for not being anxious to prolong ill will. I would be the last person in the world I hope to wish to enter into matters in this painful case that were unnecessary to enable my client to obtain the relief to which she is entitled."

Whereupon by reason of the novel situation counsel for Mrs. Fitz Gerald requested and the Court granted a half hour's adjournment for conference and consideration; after which the jury were sworn and the case proceeded with in the regular orderly way; after the statement or opening by counsel, witnesses were called, testimony and proofs submitted, clearly establishing the claims of the libellant on

the question of adultery and cruelty on the part of Mr. Fitz Gerald, and after a fair, clear and impartial charge by the Court to
182 the jury, cautioning them particularly as to their duty on bona fides and mala fides in such cases,

"the jury retired and after an absence of about a quarter of an hour, returned into Court, with a verdict that the husband had been guilty of cruelty and adultery. On these findings, His Lordship pronounced a decree for divorce a mensa et thoro, with costs against the respondent."

The pleadings and proofs in this case in either England or this jurisdiction would have been sufficient to have entitled the libellant to a divorce a vinculo matrimonii but no power to grant such divorce is vested in the Courts of Ireland, and Irish subjects can be divorced absolutely only by special Act of Parliament.

The said Mr. and Mrs. Fitz Gerald executed an agreement under date of December 6, 1906, by the terms of which, inter alia, it was necessary to select and appoint Trustee or Trustees and the Trustees mutually selected by the said parties were the said Gerald Purcell Fitz Gerald, and Josiah V. Thompson and Charles E. Lenhart, the two latter being residents of Fayette County, Pa., and it was signed by all the said Trustees as evidencing their willingness to accept and undertake the trust as per the terms of the said agreement.

It was admitted by all parties in interest that after the aforesaid decree in divorce a mensa et thoro Mrs. Fitz Gerald was entitled to a reasonable alimony, in keeping with the circumstances and financial ability of her husband, and she was likewise yet vested with her rights in dower of and in his extensive and valuable realty. While both parties seem to have been anxious to have an absolute divorce and the said agreement touches on that subject to the extent of fixing certain necessary dates, yet we are satisfied and find as a fact that the primary and principal purposes were to settle and adjust the matter of
183 permanent alimony and secure to Mr. Fitz Gerald a waiver of the said dower rights of his wife and make provisions for the maintenance and future comfort of their children, and the material provisions of the said agreement in these particulars and those relevant to this proceeding are, in substance, as follows, viz:

I. He was to pay his wife alimony at the rate of 3000£ per annum from December 5, 1906, until the passage of the Act of Parliament dissolving the said marriage, in the meantime the wife to make no application to the Court for alimony.

II. From the date of the Act of Parliament dissolving the said marriage the husband to pay to the Trustees so much of his share of the profits accruing annually from the Fayette Coke Company and the Shamrock Supply Company as will yield an annuity of $15,000 per annum for three years and after three years so much as will yield an annuity of $20,000, to be collected from the said companies and paid to the wife by and through the Trustees for and during the term of her natural life.

III. The husband also to pay to the Trustees out of the balance of his nine-tenths share of the profits from the said two companies, from the passing of the said Act of Parliament, one-third of his said share to be invested by them until a total sum of $300,000 has accumulated, one-half of the income of this fund to be paid by the Trustees to the wife and the other half is either to be allowed to accumulate or to be expended for the benefit of the children, in the discretion of the Trustees.

IV. "In consideration of the benefits to be obtained by the foregoing provisions in her favor the wife hereby agrees that in the event of the act of divorce becoming law that any right she may have to dower, alimony or otherwise under the laws of any of the United States of America or of Great Britain or Ireland shall be extinguished by and merged in this agreement, the execution whereof by her shall be deemed and taken to be a waiver by her of all such rights to all intents and purposes as affecting the property of the husband."

V. The husband covenants and agrees with the Trustees that he will not encumber nor alien nor suffer to be encumbered or aliened any portion of his interest in the said properties until the said fund of $300,000 has been accumulated.

VI. In case of vacancy in the board of Trustees the remaining
two may fill it and in case they neglect or fail to do so it may
184 on petition be filled by the Court of Common Pleas of Fayette
County, Pa.; the husband agrees not to challenge or controvert the fact that his wife enjoys the status of a citizen of the State of Pennsylvania, U. S. A.

VII. The other provisions of the said agreement are regarding the custody, etc., of the children, disposition of the fund in case of death of parties or when children become of age, settlement of disputes as to meaning of provisions and other matters not material or relevant to the issues involved in this controversy.

Some time after the date of the above mentioned agreement, a bill known as "Fitz Gerald's Divorce Act, 1907," was introduced into the British Parliament "to dissolve the marriage of Lida Eleanor Purcell Fitz Gerald with Gerald Purcell Fitz Gerald, her present husband, and to enable her to marry again and for other purposes."

The record of the proceedings in the House of Lords (Plff's Ex. 2A) shows that there was submitted to Parliament for its consideration, not only the decree in divorce a mensa et thoro and Judgment of the High Court of Justice of Ireland hereinbefore mentioned, but also eminent counsel representing both the petitioner and the respondent, and agents representing both the parties, appeared and submitted substantially the same statements and proofs as were produced on the aforesaid trial in the said High Court of Justice in Ireland; and the matter was so proceeded in that on July 26, 1907, it was, inter alia, enacted by the British Parliament as follows, viz:

"The bond of matrimony between the said Lida Eleanor Purcell Fitz Gerald and Gerald Purcell Fitz Gerald her husband being violated and broken by the manifest and open adultery of the said Gerald Purcell Fitz Gerald and by his cruelty to the said Lida Eleanor Purcell Fitz Gerald shall be and the same is hereby from henceforth wholly dissolved annulled vacated and made void to all intents constructions and purposes whatsoever.

185 It is further enacted that

"It shall be lawful for the said Lida Eleanor Purcell Fitz Gerald at any time or times hereafter to contract matrimony and to marry as well in the lifetime of the said Gerald Purcell Fitz Gerald as after his decease with any man or men whom she might lawfully marry in case the said Gerald Purcell Fitz Gerald was actually dead."

Notwithstanding there is no such provision in the said enactment regarding the right of the said Gerald Purcell Fitz Gerald to remarry, yet it is a fact that five days after the date of the aforesaid enactment, viz: July 31st, 1907, he did remarry and of that union one child has been born.

As to the aforesaid agreement, all of the parties thereto in interest accepted and performed their respective parts and duties from the date thereof henceforth until June, 1910; pursuant to the provisions of said agreement the profits arising from the operation of the said two companies were, until the last named date, distributed according to the terms of the said agreement, a proper proportion thereof having been regularly paid to said Trustees for the benefit of said Lida Eleanor Purcell Fitz Gerald and another portion (amounting in June 1910 to over $34,000) paid to said Trustees toward the accumulation of the $300,000 fund aforesaid.

June 23, 1910, the above named Trustees were advised and given notice in writing by the man in charge of the operation and management of said two companies and business manager of Mr. Fitz Gerald, as follows, viz:

"You are hereby notified that G. P. Fitz Gerald has instructed me, as his business manager, not to pay to the Trustees, Alimony or to Children's Fund, amounts due June 30th, 1910."

Accordingly the said amounts were not paid nor, so far as
186 appears in this proceeding, have any other or further amounts
since that date been paid to the said Trustees nor to any other person for or on account of the said funds provided for in the said agreement. It being insisted that the said Mr. Fitz Gerald repudiated the said agreement and declared the same not binding on him, that he refused as one of the Trustees to receive or pay over any part of the said trust funds and prevented further execution of said trusts.

In view of which facts and conditions this proceeding was instituted and a bill of complaint filed setting forth sufficient of the situation and of the foregoing facts to give this Court, sitting in Equity, jurisdiction; the prayer for relief is rather lengthy, consisting of seven paragraphs, but it can be condensed and the material substance of it expressed in one word, viz: "performance."

So far as the important and material averments of the said bill are concerned, the answer of the defendant, Mr. Fitz Gerald, not only does not seriously question or deny them but in substance and effect, if not in direct language, practically admits their verity and for his defense avers that the said agreement is illegal, null, void and invalid as being collusive and against public policy, in view of the circumstances surrounding it and under which it was secured and executed, as set forth in his answer, as follows, viz:

"On the 16th day of February, 1906, I then being a British subject domiciled in Ireland, did file in His Majesty's High Court of Justice in Ireland, King's Bench Division (Matrimonial) a petition praying said Court to decree a divorce a mensa et thoro from my then wife, the said plaintiff, Lida Eleanor Purcell Fitz Gerald, wherein I did charge my said wife with adultery. On the 21st day of February, 1906, my said wife, Lida Eleanor Purcell Fitz Gerald, did file in the said High Court of Justice her petition against me, wherein she prayed for a divorce a mensa et thoro, and in which petition she did charge me with the offences of adultery and cruelty. The said causes were proceeded with and Bills of Particulars were 187 filed by each of us in our said suits under orders of the said Court, setting forth the particulars of said offences so charged. During the said litigation, to wit: on or about the 3d day of September, 1906, my said wife and I did agree as follows:

"That I would withdraw my petition for divorce against her, and that I would not contest her petition for divorce, but would admit the said charges of adultery and cruelty and facilitate her in procuring said divorce a mensa et thoro in said Irish Court, and that upon procuring such decree, as absolute divorces are not granted under Irish law, she would proceed to apply for and secure an Act of Parliament, declaring an absolute divorce from the bonds of matrimony between her and me. In compliance with and pursuance of said agreement, I did on the 5th day of December, 1906, withdraw my said action for divorce and the charges therein against my wife, and did not contest my said wife's petition for divorce, and did make the admissions heretofore referred to. In consequence thereof, on the said 5th day of December, 1906, my said wife obtained a decree of said Court divorcing her a mensa et thoro. On the succeeding day, to wit: December 6, 1906, in further pursuance of said agreement heretofore referred to, and in consideration of the said acts on her part and my part heretofore referred to, the contract or agreement set forth in plaintiffs' Bill, and which is the foundation of these proceedings, was entered into between her and me, the further consideration for said agreement on her part being, as set forth therein, the procurement by my said wife of an Act of Parliament divorcing her and me. I particularly call the attention of the Court to the second clause of said agreement, as set forth in plaintiffs' Bill, wherein the said consideration is set forth in the following language:

(*a*) "2. As and from the date of the passing of the Act of Parliament dissolving the marriage of the husband and wife, and in consideration of the premises, the husband will pay to the Trustees in trust, &c."

and I call the attention of the Court to the third paragraph of the said agreement or contract, wherein the consideration for the same is again set forth in the following language:

(*b*) "3. For the consideration aforesaid the husband will also pay to the Trustees out of the balance of his nine-tenths (9/10's) share of the profits arising out of the two companies named above, to be paid to and collected by the Trustees from time to time, from the passing of the said Act of Parliament in manner as follows, to wit:"

and I call the attention of the Court to clause 11 of the said contract or agreement, wherein it is provided as follows:

(*c*) "11. It is hereby agreed by and between the husband and the wife that the following provisions relating to their children shall take effect from the time of the passing of the said Act of Parliament, &c."

188 *Conclusions of Law.*

I.

In the language of Mr. Justice Sharswood in Eaton's Appeal, 66 Pa. 483,

"The first and most important question in the cause is, whether this answer is responsive to the bill, and entitled therefore to the weight assigned to it by the well settled rule of evidence in equity, that an answer responsive to the bill can only be overcome by the testimony of two witnesses, or of one witness corroborated by circumstances elsewhere in evidence."

So far as this case is concerned we are clearly of opinion that the above question is not difficult of determination and may be solved by direct quotations of principles enunciated by our Supreme Court.

"When an answer contains facts not responsive to any interrogatory in the bill, it is not an answer for the defendant; but the facts, if material, must be established by independent proof." Eberly vs. Groff, 21 Pa. 251.

"A denial or averment in an answer to a bill in equity not directly responsive to the bill, is not evidence for the defendant." Coleman vs. Ross, 46 Pa. 180.

"The plaintiff in her bill complained of the erection by her adjoiner of a party wall with openings. The defendant in his answer averred that he did it by license of a former owner of plaintiff's lot. Held that this was not responsive to the bill, but was an affirmative allegation in avoidance of the plaintiff's demand, which should be established by independent testimony." Vollmer's Appeal, 61 Pa. 118.

In the last named case would it have changed the situation, so far as the rule in question is concerned, if the defendant had, in his answer, averred that he erected such wall even by the license of the plaintiff in that case—the then owner of the said lot? We think not, and in our opinion that brings the case at bar almost on an exact parity with the principles as expressed in Vollmer's Appeal.

189 "Where the allegations of the bill are that the parties entered into a written agreement and that defendant violated the same and defendant answers that she has the right so to do by virtue of a parol agreement entered into at the same time, such answer is not responsive and the burden of proving the parol agreement is upon the defendant." Kenney's Appeal (Pa.) 12 Atl. 589.

"The seventh objection is that the answer of the defendant is wholly uncontradicted by the evidence, and must be taken as admitted. It is enough for this that the replication puts in issue the averments of the answer, and throws upon the defendants the burden of sustaining them. Catherwood's Appeal, 52 Pa. 154.

"When the plaintiff calls upon the defendant to answer the allegations contained in the bill, he makes him his witness for that purpose only, but for no other. Whatever constitutes in truth a part of the facts stated in the bill, the defendant has a right, and indeed is bound to set out. But he cannot make himself a witness for himself generally, and introduce other facts either in avoidance or defense. It is considered indeed as a test whether, as a witness on examination, he could be cross examined as to the matter which he states in anticipation of his defense on a trial at law." Eaton's Appeal, supra.

In the same case Mr. Justice Sharswood in referring to "an able and exhaustive opinion by Chief Justice Parker," of N. H., on the subject, says:

"He declares the true distinction to be between allegations upon those subjects upon which the bill requires an answer, and allegations of new matter not stated or inquired of in the bill, but introduced by the defendant in his defense. Whether the plaintiff calls upon the defendant to make an answer which must directly deny or affirm some statement, or whether he requires him to make a statement of the facts upon the particular subject matter, the principle is the same."

In paragraph eight of Plaintiff's Bill in this case they allege the making of the agreement of December 6, 1906, and set it out in full; a responsive answer to that averment would be either to admit or deny the execution of such a contract, and in the eighth paragraph of his answer the defendant, Mr. Fitz Gerald, admits such execution and that the copy set out is a correct one and then undertakes to
make himself a witness, by his answer under the aforesaid
190 rule, to testify as to the unlawfulness of the consideration, to
avoid becoming the actor in setting up and proving what
he claims to be a void or invalid contract, for the purpose, doubtless, of avoiding the rule in Irvin vs. Irvin, 169 Pa., 529.

The plaintiffs charge a violation by the defendant, Mr. Fitzgerald, of the contract and a refusal to abide by and carry out its provisions, which he admits, averring that he has wholly repudiated the contract. In our opinion his reasons for so doing are not in response to any allegation in the bill but are matters set up by way of justification and thus clearly become matters in avoidance which the law requires he should prove.

Suppose the plaintiffs were suing at law on this agreement to recover money due under its terms, would they be required to prove the consideration—the instrument is under seal and the consideration is fully stated in it and it is not a bond, bill or note containing a money consideration; would it not be sufficient for the plaintiffs to prove and offer the contract and establish the amount due and rest their case and if the defendant undertook to defend on the ground of either an illegal contract or unlawful consideration would he not be compelled to become the actor and, under the rule in Irvin v. Irvin, supra, would such evidence be admissible?

In view of the foregoing we are clearly of opinion that the answer of Mr. Fitzgerald is not responsive to the bill to the extent claimed, nor so as to require the testimony of two witnesses or one witness and other corroborating circumstances to overcome it and we are satisfied that we did not commit error in refusing to dismiss the plaintiffs' bill on the application of defendant at the close of the plaintiffs' case.

191 It is urged and insisted on the part of the defendant, Mr. Fitzgerald, as a matter of law, that we must conclude from what appears in and on the face of the agreement of December 6, 1906, particularly the parts quoted supra from his answer, that it is void and invalid as being collusive and against public policy.

What is Collusion?

In general, it is where two persons apparently in hostile positions and having conflicting interests, by arrangement do some act in order to injure a third person or deceive a court.

In divorce law, Bouvier says collusion is "an agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury."

"Collusion implies a concerted or agreed purpose to commit a fraud or accomplish a wrong."

Wallace v. Jones, 107 N. Y. Sup. 288.

"Collusion is a corrupt combining of married parties to procure a sentence of judicial order by some false practice, as for one of them to appear to or in fact do what would otherwise be ground for divorce, or in any way to deceive the Court in a cause, thus seeking its interposition as for a real injury."

Pohlman v. Pohlman, (N. J.) 46 Atl. 658.

"The term "collusion" as used in divorce suits is an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the Court would not grant."

Doeme v. Doeme, 89 N. Y. Sup. 215.

What Do We Mean by Public Policy?

"Public policy means public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy."

Goodyear v. Brown, 155 Pa. 514.

192 When the decree a mensa et thoro was secured in the Courts of Ireland Mrs. Fitzgerald's right to permanent alimony in an amount commensurate with her station in life and the financial ability of her husband was absolute, full and complete, the only unsettled question in connection therewith was the determination of the amount by the Court, unless it were adjusted otherwise.

How could it be either collusive or against public policy for the parties, instead of requiring the Court to do so, to amicably and mutually adjust such matter, and what difference whether under the name of alimony or otherwise, and wherein does or can such adjustment violate or infringe on the principles as expressed above?

Further, there appears to us no reason why, on principle, such a contract as the agreement of December 6, 1906, which, under all the circumstances, we think, is fair, equitable and reasonable on its face, should be considered as collusive or against public policy as matter of law; even though it were executed pending an application or a contemplated application for an absolute divorce by Act of Parliament, particularly in view of the fact that the parties had previously been divorced a mensa et thoro by the Courts of Ireland on grounds that would in this state or England have entitled the plaintiff, Mrs. Fitzgerald, to an absolute divorce; which condition made the matter of securing a divorce in Parliament largely a matter of form, as in Westropp's Divorce Bill, 11 Appeal Cases, 294, the House of Lords decided that whatever would be sufficient ground for a divorce under the Matrimonial Causes Act of 1857, which was limited in operation to England and Wales, would entitle the petitioner, if a citizen of Ireland, to a divorce by Act of Parliament.

Lord Herschell said:

"Whatever may have been the case prior to the passage of the Divorce Act of 1857, I think that since the passage of that 193 Act whatever would justify a divorce and afford a legal ground for it according to the provisions of that Act, where that Act prevails, would afford sufficient ground for an application to the Legislature to grant a divorce in that part of the United Kingdom where the Act does not itself operate."

Because of the marriage relation the husband was bound to support his wife. The compensation which she was to receive under the contract was in the place of the support which the defendant was bound to provide while the marriage relation continued and which he was none the less bound to provide when, owing to his fault, it was lawfully dissolved. This legal obligation constituted a part of the basis for the settlement of their affairs and for the making of this agreement by which it was definitely determined how much he should contribute for the future support and comfort of his wife and children.

The property of the divorce is a matter entirely different from and should not be confused with the amount of alimony. Can it be assumed that parties who agree on the amount of alimony, in case of divorce, thereby necessarily agree to procure a divorce by fraud or collusion? The reason permanent alimony is in such cases generally made to depend upon the granting of a decree, is because only then does the right to it come into existence. If the divorce is secured the right to permanent alimony arises and is simultaneously extinguished by the prior settlement; if denied, there is nothing upon which the settlement can act.

Contracts fairly entered into by persons able and willing to do so should not be declared void for illegality unless the opposition between the law and the contract is so violent that the Court feel a clear and strong conviction of their incompatibility.

194 In Printing Company v. Samson, 19 Eq. Case L. R. 462, Sir George Jessell said:

"If there is one thing more which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of Justice."

The same principle is expressed by Chief Judge Andrews in Diamond Match Co. vs. Roeber, 106 N. Y. 482, as follows:

"Indeed what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interest of society favor the utmost freedom of contract within the law and require that business transactions should not be trammeled by unnecessary restrictions."

In view of the serious consequences to Mrs. Fitzgerald and her children of declaring void the contract of December 6, 1906, we feel that we should not do so only on the solemn conviction that the interests of society imperiously demand it. Then, bearing in mind the paramount rule of public policy that the freedom to contract should not be unnecessarily circumscribed, wherein is the said agreement collusive or against public policy?

If we confine ourselves to the terms of the agreement we shall not find an illegal purpose without doing violence to the plain expressions of the parties. Suppose it were conditioned on the passing of an Act of Parliament divorcing the parties, can it for that reason be said that Mrs. Fitzgerald would require any advantage by the passage of that Act? By the terms of the agreement the Act of Parliament which secured to her certain benefits extinguished certain valuable rights—dower and alimony. In view of their circumstances in life and of Mr. Fitzgerald's financial ability and of the rights surrendered by Mrs. Fitzgerald, can it be decided as a matter of law that the benefits secured by Mrs. Fitzgerald were so disproportionate to the rights surrendered by her as to raise a conclusive presumption of collusion? Certainly not.

195 Public policy requires the enforcement of no such rule, on the contrary it discountenances unnecessary litigation and favors the adjustment of controversies out of court.

The law in England regarding such matters has been settled for centuries. The practice requiring a husband to make provision for his wife prevailed even where the husband was the complainant and the wife was the guilty party. At first this practice took the form of an unofficial inquiry instituted generally by some designated member of the Divorce Committee in the House of Commons, who required the husband to give bond for the support of his wife in case the application for divorce then pending in Parliament should become law.

Ultimately this practice became so well established and recognized that a functionary was officially appointed by Parliament to protect the interests of the wife by requiring the husband to make provision for her by private settlement, conditioned upon the passing of the Bill of Divorce. This functionary came to be known in later times as "The Lady's Friend."

Under the English law the validity of such agreement is beyond question and it was urged in such cases that the amount should be settled by the parties themselves and this was usually done, "but when a difference arose, a member of the House of Commons, having heard both sides by their agents, fixed the amount, and saw that it was settled on the wife by a private deed" or bond: Macqueen, in his work on the Law of Marriage and Divorce, 2d edition, referring to the form of bond ordinarily required, says, at page 147:

"But Parliament, or rather the lower House, made it ultimately a positive rule in all cases to impose this humiliating burden; and the Commons had a functionary appointed to watch the delinquent wife's interest and make stipulations for her. The performance of this duty was an object of ambition in the House. The Senator chosen for the post was designated "The lady's friend."

196 The following is the form of bond which was ordinarily insisted upon by "The Lady's Friend":

"Know all men by these presents, That I, ——, am held and firmly bound to ——, his executors, administrators, and assigns, in the sum of —, to be paid to the said ——, his executors, administrators or assigns, for which payment to be well and truly made I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated this fourteenth day of July, one thousand eight hundred and fifty-seven, and in the twenty-first year of the reign of Queen Victoria.

Whereas a bill is now pending in Parliament to dissolve the marriage of the above bounden —— with his present wife, ——, and for other purposes. Now the condition of the above written bond or obligation is such, that if the said —— do and shall well and truly pay or cause to be paid to the said ——, during the life of the said ——, his now wife, one annuity or yearly sum of —, by equal half yearly payments, on the — day of —, and the — day of —, in every year, with a proportionate part thereof up to the day of the decease of the said ——, the first half yearly payment thereof to be made on the — day of —— next ensuing the date of the above written bond; or if the said recited bill shall not come into law, then the above written bond or obligation to be void, otherwise to be and remain in full force and virtue.

Signed, sealed and delivered, &c."

Clifford in the History of Private Bill Legislation referring to the same practice, says, at page 414, vol. 1:

"This rule was enforced privately but effectively. In the House of Commons there was functionary called 'The Ladies' Friend', an office generally filled by some member interested in the private business of Parliament who undertook to see that any husband petitioning for a divorce made suitable provisions for his wife.

No clause to this effect was inserted in the Bill lest it should be rejected in the other House, but as a condition of obtaining relief, a husband was made to understand that, before the Bill passed through Committee, he must enter into a bond securing some moderate income to his wife."

In Tyrell's Divorce Bill the House of Lords refused to grant
the husband's Bill for divorce unless provision were made
197 for the wife, and for that reason postponed the Bill in order
to allow such a private arrangement to be made. The proceedings in this case are outlined in said Clifford's History, page 413:

"But there were cases in which the House of Lords felt that injustice would be done if, the marriage settlement being torn up, a wife was deprived of all interest in the fortune she had brought into settlement. In 1829 they expressed an opinion that, as the wife had brought 45,000£ to her husband, he ought to make some provision for her support. Counsel for the husband replied that, while he would do all that a gentleman ought to do, he felt indisposed to support her in adultery. Thereupon the Bill was postponed, but, an arrangement being made, was afterwards passed."

In Lewelyn's Divorce Bill Sess. 1851, the husband since the separation from his wife had become entitled in her right to the sum of 200£. Application that the husband should be directed to pay this sum refused, it being understood that matters of this sort were made the subject of private arrangement between the parties.

The same question is considered in Pritchard on Divorce, page 15, where the following note by Col. Wilson Patten, M. P., late Chairman of the Divorce Committee of the House of Commons, is set forth:

"The exact amount of the sum was regulated in some measure by the circumstances of the husband, as well as by those of the case itself; but in all instances the allowance was as small as was consistent with the main object in view. The practice being generally known by the agents, usually employed to conduct Divorce Bills through Parliament, the parties usually settled the amount themselves, but when a difference arose, a member of the House of Commons, having heard both sides by their agents, fixed the amount, and saw that it was settled on the wife by a private deed before the bill passed its last stage in the House of Commons.

"I have always understood that the practice arose in the last century out of the following state of things: The House of Lords always declined to pass a Divorce Bill in which alimony was allowed to the wife. The House of Commons insisted, for the reasons given above, that it ought to be allowed, and at length it persisted in its opinion, to the rejection of all Divorce Bills for several sessions.

The difficulty was at last got over, on the suggestion, I believe of Lord Howick, afterwards Earl Gray, that previous to the passing of any Divorce Bill through the Commons proof should be given
198 that a settlement had been made on the wife by means of a private deed, and a member was always thereafter appointed, whose duty it was to see that this was done."

It will be observed that none of these authorities contains any suggestion that an agreement of this kind, made in contemplation of a Legislative divorce, can for that reason be regarded as collusive or against public policy.

This view is further supported by practical considerations of the highest importance.

It is, we think, well settled, and we do not understand it to be disputed that the wife has no claim for alimony after the granting of a Legislative divorce, for the reason that the marital relation is thereafter completely destroyed, so if her rights in that regard are protected it must be done previous to the date of the Act.

It is also well settled in this country that the Act divorcing the parties cannot provide for the payment of alimony, for this would be an exercise of judicial and not of legislative power.

Crane vs. Meginnis, Gill & J. (Md.) 463;
Gaines vs. Gaines, 9 B. Monroe (Ky.) 295;
Maguire vs. Maguire, 7 Dana. (Ky.) 184;
Townsend vs. Griffin, 4 Harr (Del.) 440.

If, therefore, as defendant insists, parties cannot lawfully contract with one another with respect to alimony prior to the granting of a Legislative divorce, and if the Act dissolving the marriage may not provide for it, and since subsequent to the passage of the Act the wife has no right to alimony from her former husband, then it follows that she is without remedy whenever the marriage is dissolved by Legislative act.

By statutory enactment in this state the rights of the wife to alimony—even in cases where she was the guilty party—have been jealously guarded.

Act of Feb. 26, 1817, Sec. 1, 6 Sm. 405,
Act of April 15, 1845, P. L. 455,
Act of April 11, 1862, P. L. 430,
Act of June 25, 1895, P. L. 308.

199 Courts in this jurisdiction have recognized and enforced agreements of separation between husband and wife which provide for the husband paying the wife certain sums, and later when divorce proceedings were instituted the Courts held such agreements binding and that the husband should pay the amount provided in the agreement as or in the place of alimony.

Bloom vs. Bloom, 17 C. C. R. 478,
Shepherd vs. Shepherd, 18 C. C. R. 614.

For reasons hereinbefore and expressed in hereinafter citations, the tendency in American jurisdictions, we think, is in the direction of relaxing the rigor of the doctrine that contracts in settlement of alimony during the pendency of proceedings for divorce are void, and are coming to be made dependent largely on the special circumstances attending each particular case.

In Storey v. Storey, 125 Ill. 608, it was held that, although a husband and wife could not enter into an agreement for divorce yet the amount of alimony and the terms of payment might be arranged between them by consent. Said the Court, at page 610:

"While it is true that a husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay the wife, and the terms of the payment and the length of time during which such payment is to continue, may be arranged between them by consent."

In Snow v. Gould, 74 Me. 540, it was held that an agreement between parties for a divorce, declaring the terms upon which a divorce might be decreed, does not necessarily show connivance or collusion. Where no fraud is intended to be thereby practiced upon the Court and no facts are suppressed such an agreement may be entirely unobjectionable. The Court says, at page 544:

"An agreement of divorce is not necessarily collusion or connivance. It depends upon whether it is an attempt to obtain a divorce not justified by the real facts; whether it is intended to practice fraud upon the Court. Mr. Bishop deduces from the authori-
ties this rule upon the subject: 'An agreement between the
200 parties, not involving an imposition upon the court or a sup-
pression of facts, to facilitate the proofs and smooth the
asperities of the litigation, is, although liable to be looked into by the court, not collusion or otherwise objectionable. It may be meritorious.' 2 Bishop, Marriage and Divorce, 6th Ed. Sec. 28. Our own Court has said as much."

Burnett v. Page, 62 Me. 122,
Badger v. Hatch, 71 Me. 562.

In Parsons v. Parsons, 62 S. W. 719, it was held that an agreement which provided for the division of the husband's property and further stipulated that "if either of said parties shall hereinafter institute divorce proceedings against the other or further prosecute the divorce suit above named it shall not vary the property rights of either of said parties," relieved the husband from the obligation to pay alimony and was not objectionable as collusive. Referring to this provisions the court said:

"There is no proof of fraud in the execution of the contract. Such agreements, when fairly made, contravene no public policy, and are not void. * * * There is nothing in the record to impeach this contract and it is conclusive on the parties."

To the same effect is the opinion of the Court in Collier v. Collier, 66 Ill. 484, where a note given in satisfaction of all claims of alimony was sought to be impeached as collusive. Mr. Justice Waterman, delivering the opinion of the Court, said:

"The question presented in this case is whether a note upon which judgment was recovered against the plaintiff in error was given in settlement of a valid claim for alimony which the defendant in error had against him. While a husband and wife may not enter into an agreement for divorce yet the amount of alimony the husband is to pay the wife, the terms of payment and the length of time payment is to be made may be arranged between them by consent. Buck v. Buck, 60 Ill. 241; Storey v. Storey, 125 Ill. 608. The question of whether the note in suit was given for alimony and not for an agreement to permit a divorce was fairly submitted to the jury upon conflicting evidence, which fully warranted the jury in arriving at the conclusion it did."

In Julier v. Julier, 62 Ohio, 90, the Court said:

"The parties in the case before us were competent under the statute to contract with each other and there is no reason why in agreeing upon the amount that should be paid the wife in money they
201 might not stipulate for the release of the interest of either in the property of the other."

In Burnett v. Paine, 62 Me. 122, it was decided that notes given by a libelee to a libellant during the pendency of proceedings for divorce were valid in the absence of evidence tending to prove collusion. The entire opinion of the Court, delivered by Peters, J., is as follows:

"It does not appear that the notes in suit were given to the plaintiff's intestate as a consideration for her procuring a divorce from the defendant, nor that her deed was given to him to induce him not to defend against her libel. The case seems to amount to this: The libellant having a cause for divorce the libelee desired to defend against it only so far as the claim for alimony was concerned. The claim was adjusted by the parties upon terms to be carried into effect provided a divorce was decreed. We can see no impropriety in their doing so. The same thing is often done under the eye of the Court. Such questions may well be left for settlement with the parties interested, where they can agree. Of course, the Court may exercise a supervision of such adjustment, so far as to see that no wrong is perpetrated whenever there seems to be a necessity for its interposition."

In Dutton v. Dutton, 30 Ind. 452, an agreement by the parties pending a suit for divorce was upheld, which provided that certain property should be received in settlement of all claims for alimony in case a divorce should be decreed. The Court refused to charge as follows:

"That a parol agreement made between husband and wife in view of separation and fully executed on the part of the husband, wholly for a consideration which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable, and just, the contract will be upheld."

The Appellate Court, reversing the decision of the Court below, said:

"We think the instructions asked fairly stated the law and should have been given. * * * When such agreements are fairly made and are reasonable and proper they will be upheld in equity."

202 In Martin v. Martin, 65 Iowa, 255, the Court discussing a case similar to the one at bar, said:

"Defendant alleged, in one division of his answer that before the commencement of the suit he and plaintiff by mutual consent and agreement separated and that they then entered into a written contract by which plaintiff agreed in consideration of the conveyance by him to her of certain real estate and the delivery to her of certain personal property and the payment to her of certain money that in her action of divorce she would make no claim for alimony either temporary or permanent and that she would release him from all liability for the support of their minor shild. Plaintiff demurred to this division of the answer on the ground that the alleged contract was illegal and void. The Circuit Court overruled the demurrer and this ruling is assigned as error. * * * It was held in Blake v. Blake, 7 Iowa, 46, that the capacity of the parties to contract with each other were so enlarged by the statutes of this state, as that a contract of this character, if it was supported by a just and adequate consideration and was untainted by fraud or circumvention or improper influence would be enforced, and this holding was adhered to in subsequent cases."

In Chaplin v. Chaplin, 135 Mass. 393, it was held than an action might be maintained on a promissory note given to a woman by her former husband pursuant to an agreement entered into pending divorce proceedings, in settlement of all her claims for alimony.

In Calame v. Calame, 25 N. J. Eq. 548, it was held that an agreement made by a husband with his wife to give her certain property in lieu of all her claims for alimony and conditioned upon a divorce being granted, would be enforced in equity. Said the Court:

"I do not mean, however, that every agreement which is thus made will be supported. The court should undoubtedly look into these arrangements and their surroundings; but, when it appears that the separation of the wife, forming the ground work of this agreement, was justifiable and the provision is suitable, to this extent it is, in my judgment, safe to say that the contract should be upheld."

In King v. Mollohan, 61 Kan. 683, it was decided that an agree-
ment would not be treated as invalid because there was, at
203 the time of its execution, an understanding between the
parties that an early divorce should be obtained. Said the
Court, at page 69:

"Under the circumstances we think there was no collusion or fraudulent purpose in making the agreement, and that the action of the parties did not contravene public policy."

In Gibbons v. Gibbons, 54 S. W. 719 (Ky.), it was held that, where a husband sued for a divorce on the ground of five years' separation, his agreement to pay the wife a certain sum per month in consideration of her agreement not to delay the decree of divorce by interposing a claim for alimony was not void as against public policy. The Court said:

"Do these averments of the petition show a contract based upon an immoral consideration? We think not. Looking alone to the allegations of the appellee's purpose in making the offer 'of speedily procuring a divorce and adjusting the question of alimony' and the statement that she accepted his offer and 'filed no plea in his suit against her for divorce' it might reasonably be contended that the contract was based upon the consideration claimed by the appellee. But notwithstanding the maxim fortius contra proferentem, a fair construction must be placed upon the whole petition and the language used must not in order to sustain a demurrer be wrested from its reasonable import in the connection in which it is used. Appellant begins by averring in unmistakable language the existence of the ground for divorce (five years' separation) which absolutely entitled the appellee to a decree; that he brought suit upon that ground, and for the purpose of speedily procuring a divorce and adjusting the question of alimony, he made the agreement sued on. These averments taken as true upon the demurrer show the appellee to have been entitled to a divorce. Nothing stood in the way of the obtention of a judgment except the taking of proof as to the separation which could not be agreed to but was required to be proven whether denied or not and the adjustment of the wife's claim for alimony, should she make one. Such a claim would almost inevitably postpone the decree of divorce until the alimony should be adjusted. The petition, therefore, shows the appellee's offer to have been made not for the purpose of securing a divorce but for the purpose of adjusting the wife's claim for alimony, for that, according to her statement in the petition, was the only claim she could truthfully have set up."

204 We believe the case at bar is distinguishable from all the above cited cases by reason of the fact that the decree of divorce a mensa et thoro had already been secured and that th wife's right to permanent alimony had consequently attached before the contract was made.

Permanent alimony is alimony allowed after the trial and is measured according to the husband's ability, the social standing of the parties and the needs of the wife and children.

Keezer on Marriage and Divorce, 278, page 151.
Sparhawk v. Sparhawk, 120 Mass. 390.
Westmeath v. Westmeath, 3 Knapp, 42.
Cooke v. Cooke, 2 Prill Ecc. 40.
Charles v. Charles, 15 L. T. N. S. 416.

This fact is recited in the agreement and her right to make application to the court for alimony is expressly relinquished in consideration of the stipulated payments to be made partly in lieu thereof. It differs from cases in which the agreement has been executed prior to the granting of the divorce for the reason that the right to permanent alimony in such cases had not come into existence at the time the contract was made. Here the right to such alimony was perfect and this right was merged by mutual consent in the contract.

Nor can it be said that by the agreement her position was changed to her advantage, for while she doubtless secured valuable rights she surrendered rights of great value—dower and alimony, in a large estate. The rights which she surrendered were positive, the rights which she secured were uncertain and limited to the amount stated in the agreement and might fall far short of it or dwindle to nothing at all, depending on the profits incident to the operation of the Fayette Coke Company and the Shamrock Supply Company.

205 In view of the English law, even if the agreement of December 6, 1906, were made and entered into in contemplation of the Act of Parliament divorcing the parties absolutely can it, under the circumstances of this case, for that reason be held to be collusive and against public policy?

We should remember that the parties at the time of the execution of this contract were domiciled in Ireland, where the power to grant divorces a vinculo matrimonii has been absolutely withheld by Parliament from the courts, their authority being limited to the granting of divorces a mensa et thoro.

What are the fundamental principles upon which legislative divorces are granted and sustained?

Legislative divorces are not subject to the ordinary rules governing actions for divorce. They depend upon the sovereign will of the law-making power, and their validity is in no way impaired by the fact that no cause for divorce is shown to exist.

As was said by Mr. Justice Field in Maynard v. Hill, 125 U. S. 190:

"If within the competency of the Legislative Assembly of the Territory, we cannot inquire into its motives in passing the Act granting the divorce: its will was a sufficient reason for its action. * * *

The facts alleged in the bill of complaint that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the Act. Knowledge or ignorance of parties of intended legislation does not affect its validity if within the competency of the Legislature."

In Cabell v. Cabell, 58 Ky. 319, the Court says, at page 329:

"Now to what extent the public may be benefited, or how far the legislature may have regarded the public good promoted by the act in question, is an inquiry we need not pursue. It is enough to know that the body in the exercise of its wisdom and discretion, enacted the law, and the presumption exists that they were satisfied that to some extent it had or would have that effect; and where an act of the legislature is not interdicted by the fundamental law of the land, it is not for this department of the government to say that there was no necessity for the enactment, or that it was not promotive to some extent of the public good."

206 The granting of such divorces is an exercise of legislative, as distinguished from judicial power, upon a subject properly within legislative control. The proceedings of that body are governed by different principles and bear not even the semblance of a judicial inquiry. It may proceed without notice, and if it gives heed to the inclinations of the parties it is a matter of favor and not of right. It may decree a dissolution of the marriage with or without cause and with the consent or in spite of the dissent of both parties; but this is a matter solely of public policy to be determined by the legislature with reference to how far such legislative act will affect favorably or unfavorably the welfare of the state.

The power to grant divorces by legislative act is a peculiar attribute of sovereignty which has been exercised in this country from the earliest times and the validity of such divorces has been sustained in the absence of constitutional limitations. Says Cooley in his treatise on Constitutional Limitatons, page 110:

"The granting of divorces from the bonds of matrimony was not confined to the courts in England, and from the earliest days the Colonial and State legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases."

Says Kent in his Commentaries, Vol. 2, page 97:

"During the period of our Colonial government for more than 100 years preceding the Revolution, no divorce took place in the Colony of New York, and for many years after New York became an independent State there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special act of the Legislature."

In Croniss v. Croniss, 54 pa. 255, the Supreme Court of Pennsylvania says:

207 "Special divorce laws are legislative acts. This power has been exercised from the earliest period by the Legislature of the Province and by that of the State under the Constitution of 1776 and 1790. The Constitution of 1790 was framed in view of this practice. The continued exercise of the power after the adoption of the Constitution of 1790, cannot be accounted for, except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. Communis error facit jus would be sufficient to support it, but it stands upon the higher ground of contemporaneous and continued construction by the people, of their own instrument."

See also

Maynard vs. Hill, 125 U. S. 190,
Jones vs. Jones, 12 Pa. 350,
Roberts vs. Roberts, 54 Pa. 265,
Crane vs. Meginnis, 1 G. & J. (Md.) 463,
Stone vs. Pease, 8 Conn. 541.

In our judgment the rule that Courts of Justice should discountenance collusive contracts made in contemplation of divorce has no application to a case like the present, where the plaintiff and defendant were in no sense parties to the Act of Parliament divorcing them, but were merely the subject matter of the Act. Every question of fact, every point of law, had been determined in the proceedings for divorce a mensa et thoro which had been previously obtained, and which in Pennsylvania would have been cause for absolute divorce.

Suppose, however, that the agreement contemplated and required the co-operation of both parties in securing the Act of Parliament, how could that in any respect, under the facts in this case, affect the issues? What though both parties had united in petitioning Parliament for this divorce and what though this agreement had expressly contemplated and provided such a course? The policy of the law in discountenancing collusive divorces and agreements in-

tended to have that effect is to prevent an imposition on the law, which grants divorces only for specified causes, by parties masquerading in a court of justice as ostensibly opposed but actually
208 united in interest. The reasons which prevail in such cases cease to apply where the relief sought does not involve inquiries of a judicial nature based upon issues of law and of fact, to be determined upon evidence produced by the parties themselves, but depend upon the exercise of the sovereign power of the legislature.

Then, there being nothing obnoxious in the granting of a legislative divorce by consent or upon application of both parties, how can an agreement contemplating such a course for that reason be treated as collusive? Every argument to the contrary rests upon a failure to distinguish between a judicial and a legislative act; and it is well settled that a dissolution of marriage may be by either.

Bishop, "Marriage and Divorce," Sec. 787, says:

"There would, therefore, upon principle, seem to be no reason why the granting of a divorce should not be either a legislative or a judicial act; legislative when performed as a mere exercise of sound discretion * * * judicial, when divorce is demanded as a right under established laws, in consequence of some breach of duty committed by the offending party."

It is the province of the Courts to determine the questions of fact of the particular case, and to apply to these facts certain rules of law established by legislative authority. If agreements contemplating collusive divorces are void, it is because the legislature, cognizant of the dangers with which they are fraught, has expressly or impliedly declared them to be so. It is because the public occupies somewhat the position of an interested third party. In this case, both parties appearing by counsel and agents, Parliament, by adding the public consent to that of the parties, consummated their actual will.

The decision of the Court in Cabell v. Cabell, 58 Ky., 319, goes far in supporting the above proposition. In that case it was held that a legislative divorce granted, without cause, but with consent and upon application of both parties, was a proper exercise
209 of legislative power. It was further decided that the wife, who had assented to the decree and had accepted the benefits of a contract made in contemplation thereof, would not subsequently be heard to question its validity: the facts appear in the opinion of the Court:

"In 1838, Samuel Cabell and Louisa Montgomery were married in Green County, in this state, and continued to live together as man and wife until some time in 1839, when, by mutual agreement, they separated.

"By the terms of the separation the property which the wife owned before marriage was to be returned to her, and in addition thereto she was to be furnished with a riding horse and the sum of one thousand dollars, for the payment of which her husband executed to her two friends, Wakefield and Hoskins, his note, for her use and benefit. It was further agreed, and an instrument in writing to that effect executed by the parties, that either one or both might apply to the legislature of Kentucky for a divorce, and that such divorce might be granted without making provision for the support of the wife, she having been (as is recited in the paper) provided for by her husband in a manner 'satisfactory to her and her friends.'

"At the same time Wakefield and Hoskins, who seem to have acted in the matter as the relatives and friends of the wife, covenanted in her behalf and with her assent with the husband that she should assert no claim for dower against his estate at his death, and that they would be answerable to his representatives for any such claim.

"In pursuance of this arrangement, Cabell restored to his wife the property she owned before marriage and paid for her use to her friends the one thousand dollars, which she received. He likewise, at the session of the general assembly 1840-41, presented a petition setting forth the foregoing facts, and obtained the enactment of the following law:

> Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the marriage contract now existing between Samuel J. Cabell and Louisa H. Cabell, be, and the same is hereby dissolved, and they are hereby restored to all the rights and privileges of unmarried persons.'

"It is obvious that the enactment was not 'for the benefit of one of the parties, in consequence of a breach of contract by the other.' It was procured with the assent of both, for the benefit of both, and both acquiesced in it, for many years enjoying rights and privileges which they could not otherwise have been allowed. It does not appear the act was in consequence of a breach of the contract; and no feature is presented which, under the rule quoted, would make the dissolution enacted by the legislature a judicial act * * *

"The enactment in this case is made without reference to the
breach of any existing contract or law; for it does not appear
210 that either party had been guilty of a breach of conjugal or
legal duty, or of any of the obligations of the marriage contract. On the contrary, as appears from the facts stated, the separation was the voluntary act of both, not superinduced by maltreatment or misconduct of either; and its terms satisfactory, not only to both parties, but approved of by the friends and advisers of the wife. The divorce, or the special act complained of, was not procured against the will, or without the consent of the wife, but in accordance with her will and with her consent. Nor can it be said that she was deprived of her property without compensation, for she was compensated, and, as she then and subsequently admitted, in a ma*mm*er entirely satisfactory to herself and friends. * * * As the agreed facts show, she received the property and money stipulated to be paid her, resumed her previous name, removed from the state, did business, and bought and sold real estate, and in every other respect enjoyed all the rights and privileges of a femme sole. * * *"

In Adams v. Palmer, 51 Me. 480, it was held that there was nothing unconstitutional in the granting of divorces by legislative act;

especially if granted with the consent of both parties. Appleton, C. J., said, at page 486:

"But, if this were more questionable than we deem it to be, it cannot be doubted that the status of parties may be changed by the Legislature, with their mutual consent; and such consent need not be express, but may be implied. In the case before us the consent of the parties may be inferred from the act itself and their subsequent conduct. The husband was to pay a certain sum, within a limited time, to the previously appointed trustee of the wife, for her benefit. This he did, and the wife, or her trustee, received the payment. She ceased to claim a continuance of her marital rights. Nay, more, she entered into new marital relations, and hence neither objected to, nor was she in condition to object to the new ties which her husband had formed with the defendant."

In Jones v. Jones, 12 Pa. 350, it was held that, in an action in which it was sought to impeach the validity of a legislative divorce, evidence was not admissible to show that the divorce had been obtained by fraud or falsehood, or that one of the members misrepresented the facts.

Coulter, J., said:

"But that what follows, in relation to the manner of proceeding,
or agencies used by any member of the body, ought to be
211 rejected. It would be unbecoming and discourteous to the
legislative body to admit such evidence which is excluded by
the case of Fletcher v. Peck, 6 Cranch, 87."

And in Roberts v. Roberts, 54 Pa. 267, the husband, pending proceedings instituted by the wife for divorce a mensa et thoro, procured a law divorcing them absolutely. The Court held that the divorcing act was evidence in the proceedings. It held further that there was no reason to suppose that the legislature had acted for the causes upon which the judicial divorce was sought to be secured. Agnew, J., delivering the opinion of the Court, said, at page 269:

"The exclusion from the evidence of the act of the Legislature divorcing these parties from the bonds of matrimony, requires a reversal of the judgment. This exclusion assumes that the cause of divorce fell wholly within the jurisdiction of the court, or that no ground whatever existed. * * * But it does not follow that the Legislature must have acted upon the grounds set forth in the libel and not upon those within the circle of its own powers."

It has been held in this country that the Act divorcing the parties cannot provide for the payment of alimony, as it is an exercise of judicial power.

Crane v. Meginnis, Gill & J. (Md) 463,
Gaines v. Gaines, 9 B. Monroe (Ky) 295,
Maguire v. Maguire, 7 Dana (Ky) 184,
Townsend v. Griffith, 4 Harr (Del) 440.

The wife, therefore, in such cases would be absolutely deprived of her right to alimony and support, unless agreements executed prior to such divorces are upheld.

Hence there being in this case, no attempt to obtain a divorce not justified by real facts; nothing to indicate any intention to practice fraud or imposition upon the Court or suppress facts; no proof of fraud in the execution of the contract and nothing in evidence to impeach it; nothing to indicate that the parties were not competent and willing to contract; nothing showing that any wrong was perpetrated; nothing showing that the contract was not proper, fair, reasonable and just; nothing showing that the consideration was immoral or that it was not just and adequate; nothing showing that the contract was even tainted by fraud, circumvention or improper influence; nothing that tends clearly to injure the public morals; nothing tending to injure public confidence in the purity of the administration of the law; nothing tending to undermine that sense of security for individual rights which any citizen ought to feel, and, in our judgment, there being ample warrant and authority for the said parties, under the facts, conditions and circumstances surrounding the whole case to contract and agree as provided in the said agreement of December 6, 1906, and believing that right and justice are with the plaintiffs and that honesty and fair dealing demand that said contract should be sustained and performance decreed. 212

Therefore, having performed our duty as directed in Calame v. Calame, supra, where it is stated "The Court should undoubtedly look into these arrangements and their surroundings", we conclude, on this feature of the case, in the language of the Court in King v. Mollohan, supra, viz: "Under the circumstances we think thtt there was no collusion or fraudulent purpose in making the agreement, and that the action of the parties did not contravene public policy."

213

III.

What are the legal principles by which the question of equitable liens is to be ascertained?

The doctrine stated in its most general form is, that every agreement whereby a party sufficiently indicates an intention to make some particular property or fund, properly identified, a security for a debt or other obligation, creates an equitable lien upon the property so indicated which is specifically enforceable against the property in equity. This doctrine is an application of the maxim "that equity regards as done that which ought to be done."

The application of this principle is carried still further and it is applied to property not yet in existence at the time the contract is made. Accordingly, it has been held that an agreement to assign or give security upon or to affect property not yet in ease or not yet in the possession of the promisor constitutes an equitable charge upon the specific property, which will be recognized and enforced against the property in equity. The intent to give security being clear, equity will treat the instrument as an executory contract for that purpose.

Story in Equity Jurisprudence, Sec. 1040, says:

"Courts of Equity will support assignments, not only of choses in action, and of contingent interest and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility, not, indeed, as a present, positive transfer, operative in presenti, for that can only be of a thing in esse but as a present contract, to take effect and attach as the thing comes in esse. Thus, for example the assignment of the head matter and whale oil to be caught in a whale voyage now in progress will be valid in equity and will attach to the head matter and oil when obtained."

In Walker v. Brown, 165 U. S. 654, the court held the following contract, embodied in a letter, to create an equitable lien against the property therein designated:

214 "We beg to advise you that the loan of $15,000 Memphis bonds, made by me for the use of Messrs. Loyd and Company, of Ellensburg, is with the understanding that any indebtedness that they may be owing to you at any time, shall be paid before the return to me of these bonds or the value thereof, and that these bonds or the value thereof are at the risk of the business of Loyd and Company, so far as any claim you may have against said Loyd and Company is concerned."

Mr. Justice White said:

"It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value theeof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers or have notice."

"This language certainly designates the bonds or the value thereof as security for the debt to Walker and Company. It says that the bonds belonging to Brown shall not be returned to him so long as the debt to Walker is unpaid. It thus provides for the keeping of the bonds in the hands of Loyd and Company until the debt of Walker is discharged. Having stipulated for retaining the bonds as long as Walker's debt existed, the arrangement proceeds to dedicate the property thus retained exclusively to the payment of Walker's debt, for it says, not that the property so held that became the asset of the firm, not that it shall be liable to the general creditors of Loyd and Company, but that the bonds or the value thereof are to remain at the risk of the business of Loyd and Company so far as any claim that you Walker and Company may have * * * To dedicate property to a particular purpose, to provide that specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakeably to create an equitable lien."

Keezer on "Marriage and Divorce", 312 and 313, says:

"In the absence of Statute, a decree for alimony does not create a lien upon the husband's real estate, unless the decree is fastened upon a certain defendant and not on his estate.

"In granting alimony the Court may declare the decree to be a lien upon certain real estate of the defendant."

If the Court "may declare the decree to be a lien upon certain

ral state", cannot the parties by contract do the same, if the
215 purpose be clear that it is for or takes the place of alimony,
whether done in the name of alimony or otherwise? Whether clearly so expressed or not if it "is fastened upon a certain piece of property" and it is clearly provided that the fund must be raised from such property, we find and conclude that it establishes an equitable lien on the same.

Considering, therefore, the rule in equity to be that a plain intention to dedicate certain property as security for certain purposes has the effect of creating upon the designated property, an equitable lien, it remains to apply this principle to the facts of this case.

Paragraph 2 of the agreement provides that:

"the husband will pay to the trustees in trust and for the uses and purposes hereinafter set forth so much of his share of the profits accruing annually from and out of the properties known as the Fayette Coke Company and the Shamrock Supply Company situate at Shamrock near New Salem, Fayette County, Pennsylvania, United States of America, as will yield an annuity of Fifteen Thousand Dollars per annum for three years and after three years so much of his share of the said profits therefrom as will yield an annuity of Twenty Thousand Dollars per annum, the said annuity or annuities respectively to be collected from the said companies and paid to the wife by and through the trustees in such lawful manner and at such times as they shall detrmine."

Paragraph 3 provides:

"And the husband for the consideration of aforesaid covenants agrees to and with the Trustees that he will not encumber or alien or suffer to be encumbered or aliened any portion of his interest in said Fayette Coke Company and said Shamrock Supply Company without the consent of the Trustees until said fund of Three Hundred Thousand Dollars has been accumulated."

Does not this language indicate an intention on the part of the contracting parties to declare it to be a lien upon certain specified real estate and to give the plaintiff a specific equitable lien on the same?

Why is reference made to this particular fund if the stipulated
payments were intended by the parties to be secured only
216 by the personal credit of Mr. Fitzgerald? Why are they to
be paid "from and out of the properties;" and why, furthermore, are they "to be collected from the said companies and paid to the wife by and through the Trustees"? Why is provided that the properties pledged to this purpose are not to be encumbered, if it were not intended by the agreement to create an equitable charge upon them? The only satisfactory answer to these questions is that the parties intended to pledge the property as security for the obligation.

There is, in the first place, a provision that a portion of the profits, not a sum equal to, but a part of the thing itself, shall be collected at stated periods for the use of Mrs. Fitzgerald by the Trustees and paid to her, and there is, in the second place, a provision against encumbering by the defendant designed to preserve intact the security dedicated to this purpose.

The case of Patten v. Wilson, 34 Pa. 299, is directly in point. It was there held that, an agreement between an attorney and his client that the former should have $100 for his services "out of the verdict" operated as an equitable assignment to that extent of the sum recovered.

Woodward, Jr., said:

"Mr. Geyer had no lien on the fund attached, by virtue of the professional relation betwixt him and his client, but we think that under the facts disclosed in his testimony he had an equitable assignment. He wanted more than $100 for his services, but Wolf would agree to give no more, but that sum he agreed to give 'out of the verdict' if Geyer would try his cause. Geyer did try the cause, and as between himself and Wolf he acquired thus an equitable right to receive the $100; Wolf would be estopped from demanding it in the face of his agreement."

To the same effect is the opinion of the Court in Chase v. Petroleum Bank, 66 Pa. 169, where it was held that, an agreement
by a depositor that his balances should be applied to the re-
217 payment of a debt incurred by the Bank at his request,
operated as an equitable assignment of his balances to the
obligation.

Williams, J., said:

"We are of the opinion that the facts found by the special verdict show an equitable appropriation of the balances of the deposit accounts in the bank, of which the defendant had the control, the payment of the money for which his note was given. The contract was not a mere naked agreement that the funds should be applied to the payment of the dept previously contracted; but it was a contract under which the bank advanced the money, in consideration of the defendant's agreement that the funds should be appropriated to its payment."

In Spotts' Estate, 156 Pa., 281, the material facts appear in the opinion of the Court by Mitchell, Jr.:

"Taking the facts as the auditor reports them, they show that Mrs. Spotts had an open account with Beetem & Company, on which she was a creditor for $661.50 and a debtor for $173.61, leaving a net credit to her of $487.89. G. S. Beetem, one of the firm of Beetem & Company, was at that time endorser on her note for $450, and she desired him to assume the further liability of endorsing another note for $2,000. This he agreed to do, in consideration of her agreement that $450 of her credit should be offset by the note for that amount, which he undertook that the firm should pay. This arrangement was carried out. Appellant endorsed the second note, and when the first note came due his firm paid it. This was in law an equitable assignment of so much of her claim to Beetem. The one party who could object to it was the firm, and they ratified it by payment of the note. It makes no difference that this payment was after her death. She received the consideration, the endorsement of the new note, and the assumption of the other, and neither she nor her creditors could avoid performance of her part of the bargain. Her credit in the mutual account was from that time reduced by that amount, and if she had sued upon her claim for bricks, during the running of the note, she could not have recovered more than the balance after giving the credit for $450."

We are therefore of opinion and conclude that the agreement of December 6, 1906, creates an equitable lien on the individual interest of the said Gerald Purcell Fitzgerald of and in the said Fayette Coke Company that will, subject to the provisions of the said agreement, be specifically enforced in equity.

218

IV.

Having determined the agreement of December 6, 1906, to be good and valid, should the defendant, Gerald Purcell Fitzgerald, be removed as a defaulting trustee in repudiating the said agreement and refusing to execute the trust?

Under the general obligation of carrying the trust into execution, trustees are bound to conform strictly to the direction of the trust. The trust itself, whatever it be, makes and limits the trustee's powers and furnishes the measure of his obligations. It is a principle in equity jurisprudence that a repudiation of the trust by a trustee or an attempt by him to challenge the validity of the trust instrument will furnish proper ground for the removal of such offending trustee.

The inherent jurisdiction of chancery over trustees and over fiduciary agencies is well established and has been long recognized.

In Irvine v. Dunham, 111 U. S., 327, the controversy arose as to the character of an instrument claimed by the cestui qui trust to be a trust and by the trustee to be a mere gratuity left in escrow. Mr. Justice Woods, said, at page 334:

"The appellant next contends that he is entitled, under the terms of the trust, to hold on to the stock, which he received as a consideration for the conveyance of the trust property, until there has been an accounting and the expenses and counsel fees have been paid. But by his answer he denies the trust, he claims to hold the stock for himself alone, he wants no accounting and does not offer to account, or to hand over any net proceeds of the property after an accounting. In other words, he seeks to hold on to the trust property until it suits him to execute a trust, the existence of which he denies.

"Where there is a failure of suitable trustees to perform a trust, either from accident or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause, courts of equity will appoint new trustees. . . . No trustee can be more unsuitable than one who not only refuses to act, but denies the trust. When, therefore, appellant 219 denied that he held in trust the stock claimed by the appellee, the latter, having established the trust, was entitled to have, if he demanded it, a new trustee appointed."

In Backhaus v. Backhaus, 70 Wis. 518, the Supreme Court sustained the judgment of the trial court in removing the defendant as trustee upon evidence which showed that "the defendant had, before this action was commnced, denied that he had money in his hands as a trustee or otherwise, for the use, benefit and support" of the beneficiary.

In Clark v. Wilson, 53 Miss. 119, it was held that if the trustee declines to execute the trust a court of chancery will remove him and appoint a new trustee:

"If the trustee dies, becomes unable or declines to sell, and no provision is made for a successor, the vacancy can only be filled by the chancery court which never permits the trust to fail because the appointee of the grantor cannot or will not execute it."

A trustee may be removed when inharmonious relations between him and the cestui que trust have reached so acrimonius a condition as to make personal intercourse between them impossible.

In Price's Estate, 209 Pa. 210, the Court say:

"When inharmonious relations between the trustee and the cestui que trust, not altogether the fault of the former, will not generally be considered a sufficient cause for removal, yet where they have reached so acrimonious a condition as to make any personal intercourse impossible and to hinder the proper transaction of business between the parties, due regard for the interest of the estate and the rights of the cestui que trust must require a change of trustee."

And in Neafie's Estate, 199 Pa. 307, it is said that

"If his management of the trust justly subjects him to criticism and to a lack of confidence by the cestui que trust he should not be continued in the control of the estate."

220 The trustee may be removed though the conditions between him and the cestui que trust have not reached so serious a stage, if he be manifestly hostile to the cestui que trust, though his hostility be merely passive or if his conduct has been such as to justify dissatisfaction or suspicion.

Potts' Petition, 1 Ashm. 340.
Kellberg's Appeal, 86 Pa. 129.
Bryson v. Wood, 187 Pa. 366.

In Hille's Estate, 14 Phila. 247, the fact that the trustee and the cestui que trust were engaged in adverse litigation over the trustee's account, was held to be proper ground for his removal as trustee.

In Teeter v. Veitch, 61 Atlantic, 14 (N. J.), the defendant was trustee to receive the title to certain property and to convey it to a corporation then in process of formation. The corporation was formed but the defendant refused to convey. The court held that the complainants could sue for the removal of defendant as trustee and to compel him to occupy to them the property.

In view of which, under the facts of this case, we are of opinion and conclude that he said Gerald Purcell Fitzgerald should be removed as one of the Trustees and his place declared vacant.

221 **Decree.**

Now, March 3d, 1911, this cause came on to be heard at this term and was argued by counsel; and now, March 15th, 1911, thereupon,

upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

I.

That the defendant, Gerald Purcell Fitz Gerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell Fitz Gerald the sum of sixteen thousand four hundred and sixty dollars ($16,460.00) and that the said Trustees pay the same to Lida Eleanor Purcell Fitz Gerald.

II.

That the defendant, Gerald Purcell Fitz Gerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell Fitz Gerald and John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, minor children of the said defendant Gerald Purcell Fitz Gerald and of the said Lida Eleanor Purcell Fitz Gerald, the sum of five thousand three hundred and eighty-eight dollars ($5388.00), upon the trusts set forth in Paragraph Third of the agreement dated December 6, 1906, and set forth at large in the Bill filed herein.

III.

That the payments provided for in said agreement of December 6, 1906, be and the same are hereby adjudged to be a lien on all the right, title and interest of the defendant, Gerald Purcell Fitz Gerald, in and to the real property described in Paragraph Ninth of
222 the Bill filed herein and known as the Fayette Coke Company property.

IV.

That the defendant, Gerald Purcell Fitz Gerald, be and he is hereby removed from his office as Trustee of the trusts created by said agreement of December 6, 1906, and he is hereby directed to account for any pay over to Josiah V. Thompson and Charles E. Lenhart, Trustees of the trusts created by said agreement of December 6, 1906, and to the Trustee to be hereafter chosen by them, the said Thompson and Lenhart, or appointed by the Court, in place of the said Gerald Purcell Fitz Gerald, all sums in his hand or for which he is accountable under said agreement of December 6, 1906.

V.

That Richard W. Dawson Esq. be and he is hereby appointed Referee to take and state the account of the said defendant Gerald Purcell Fitz Gerald as Trustee as aforesaid and report the same to the Court and upon final confirmation of said report that judgment be entered against the said Gerald Purcell Fitz Gerald for the amount found due on such accounting.

VI.

That Josiah V. Thompson and Charles E. Lenhart, Trustees as aforesaid, are hereby directed to appoint some competent and judicious person as Trustee in place of the said Gerald Purcell Fitz Gerald within ten days; in case they are unable to agree they shall report their disagreement to the Court forthwith at the expiration of said period of ten days.

223 VII.

That the defendant, Gerald Purcell Fitz Gerald be and he is hereby restrained and enjoined from in anywise alienating, encumbering or otherwise disposing of his interest in the property of the Fayette Coke Company and in the property of the Shamrock Supply Company unless and until there shall first have been accumulated in the hands of the Trustees under the said agreement of December 6, 1906, the sum of Three Hundred Thousand Dollars as provided by Paragraph Third of said agreement.

VIII.

That the defendant, Gerald Purcell Fitz Gerald, pay the costs of this proceeding.

By the COURT.

Attest:
WM. McCLELLAND, *Proth'y.*

Endorsement: No. 618—In Equity—Thompson et al. vs. Fitz Gerald et al.—Findings of Fact, Conclusions of Law, and Decree—Filed March 15", 1911.—E. M. Leonard, Official Stenographer, Uniontown, Pa.

224 In the Court of Common Pleas of Fayette County, Sitting in Equity.

No. 618.

Between

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian Ad Litem, Plaintiffs,

and

Gerald Purcell Fitz Gerald, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners, as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

And now, to wit, this 24th day of March, A. D. 1911, the defendant, Gerald Purcell Fitz Gerald excepts to the rulings, findings and decrees of the court in the above case, and assigns the following causes of exception:

First. The learned court erred in refusing upon the petition of the defendant, Gerald Purcell Fitz Gerald, to proceed no further in the said suit, and to transfer the said suit to the Circuit Court of the United States for the Western District of Pennsylvania.

Second. The learned court erred in proceeding with the trial of the said cause while a demurrer by two of the defendants of record in the said case was pending and undetermined.

225 Third. The learned court erred in appointing William McClelland Guardian ad litem for the minor Children, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, as the Court was without authority to make such appointment.

Fourth. The learned court erred in overruling the defendant's objection to the following offer of proof:

"Mr. Untermyer: I now offer in evidence, duly authenticated, under the hand and seal of the American Consul for Great Britain, at Dublin, Ireland, the following documents: 1st, the judgment of the High Court of Justice of Ireland, King's Bench Division, before the Honorable Lord Chief Justice, Lord O'Bryon, in the case of Lida Eleanor Purcell Fitz Gerald vs. Gerald Purcell Fitz Gerald, on the 5th day of December, 1906, being Exhibit No. 3.

2nd, a like authenticated record of the proceedings before the Lord Chief Justice resulting in the verdict, being Exhibit No. 4.

3rd, the pleadings in the action referred to, being the Petition or Bill of Complaint, the Answer and the Bill of Particulars, together with the notice of rejoinder of issue between the parties. The pleadings consisting of the Petition of Mrs. Fitz Gerald, the Answer of Gerald Purcell Fitz Gerald and the Rejoinder of the Petitioner in the suit against Mr. Fitz Gerald; also the petition of Gerald Purcell Fitz Gerald, the Answer of Mrs. Fitz Gerald and the Rejoinder by Mr. Fitz Gerald in the suit brought by him in the High Court of Justice in Ireland, being the suit referred to in the proceedings that have been offered, it appearing that both suits came to trial at or about the same time.

The petition or Bill of Complaint in the suit by Mrs. Fitz Gerald against Mr. Fitz Gerald marked Plaintiffs' Exhibit No. 8; the Answer by Mr. Fitz Gerald in the same suit; marked Exhibit 9; The Bill of Particulars in the same suit, marked Plaintiffs' Exhibit No. —; The rejoinder by Mrs. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 10; The notice of Rejoinder of Issue in the same suit marked Plaintiffs' Exhibit No. —; The petition in the suit brought by Mr. Fitz Gerald against Mrs. Fitz Gerald, marked Plaintiffs' Exhibit No. 6; The answer by Mrs. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 5; Rejoinder by Mr. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 7.

226 Judge Gordon: I do not know whether that is the complete record or not. Under the practice in this country a certification or exemplification of the record would be, under the certificate of the proper officer, that 'the foregoing is the entire record of the proceedings as the same appears before us of record'; there is no such certificate here—each of these separate papers, one a tran-

script and certification of the pleadings, another a detached certification of the decree, being obviously not the exemplificaton of the record but the certificate of the clerk of court as to what the decree, in effect, contains; these things are offered in this detached and incomplete fashion and I object to them unless there is evidence that they are the complete record, and it must be presented in its entirety or not at all. I object to it because of its physical incompleteness and detachment, so that your Honor is unable to say whether it is a complete record or not. This is a judicial proceeding in the High Court of Justice in Ireland—if anything is offered it must be all offered as the record, and I object to this in its present form.

Mr. UNTERMYER: They are certified both by the Court and the shorthand writer to be the proceedings at the trial, and you will find that the proceedings are certified in like manner and the decree is also certified in like manner.

By the COURT: We will allow them to be marked as exhibits and admitted, and will overrule the objection, with an exception for the defendants."

Fifth. The learned court erred in rejecting the defendant's offer of proof as follows:

Judge GORDON: "I offer to prove in support of my objection to the admission of these records that they do not constitute the whole record of the case of which they are a part.

Mr. UNTERMYER: Will counsel specify in what respect the records are incomplete?

Judge GORDON: The record is not complete in that it does not show all the testimony taken upon the issue in the case; it does not show the testimony taken by the plaintiff on commission to the United States; it does not show the abandonment of the proceedings and the period when the position of the parties as hostile litigants ceased, and the story and history of the litigation is not disclosed by this record.

227 Mr. UNTERMYER: Is it contended that any testimony taken on commission was offered as part of the proceedings at the trial of the action? Is it contended by counsel upon the other side that the exhibit which has been offered as being a record of the proceedings at the trial is not a proper and correct record of what took place at the trial and the testimony that was there offered—is there such contention?

Judge GORDON: There is the contention that Mr. Untermyer has no authority to determine how much of the record is relevant and how much is irrelevant. Your Honor must decide that. The assurance of a member of the Bar saying that he determines that he will leave out certain parts as being incompetent and irrelevant——

Mr. UNTERMYER: Your Honor, we object to this on the ground that the record appears to be, we believe it to be, and insist that it is, the complete record of the proceedings and of the decree and if it is not it lies with the other side to rebut the presumption raised by the certificate.

By the COURT: For the present the objection is sustained, with an exception for the respondent."

Sixth. The learned court erred in overruling the motion of the defendant to dismiss the plaintiffs' bill.

Seventh. The learned court erred in refusing to find as requested by the defendant in his first request for findings of fact, which said request is as follows:

"1. The contract of December 6, 1906, on which the plaintiffs seek equitable relief as prayed for, was made on the day after the day when the plaintiff, Eleanor Purcell Fitz Gerald, obtained the decree of divorce a mensa et thoro from the defendant, Gerald Purcell Fitz Gerald, and by its terms is an agreement upon the part of the plaintiff, Lida Eleanor Purcell Fitz Gerald to proceed after the date of the said contract to procure by an act of Parliament a divorce a vincula matrimonii and upon the part of the defendant, Gerald Purcell Fitz Gerald is an agreement to pay his said wife in the case of and when she obtained such an absolute divorce by act of Parliament, and in consideration for such action on her part, an annuity of three thousand pounds for three years and of four thousand pounds yearly thereafter for the term of her natural life. The said contract by its terms was to become operative so far as the payment of the said annuities is concerned only if she did proceed to obtain and did obtain such absolute divorce."

228 Eighth. The learned court erred in refusing to affirm, without qualification the defendant's second request for findings of fact, which said request is as follows:

"The marriage of the said Lida Eleanor and the said Gerald Purcell Fitz Gerald was contracted in the United States at Los Angeles, California, on the 1st day of March, 1899, and after the solemnization of the said marriage they lived together as man and wife. On the 16th day of February, 1906, the husband began a proceeding against his said wife for divorce a mensa et thoro in the Irish Courts upon the ground of adultery. Subsequent thereto, to wit, on the 21st day of February, 1906 the wife began a proceeding for a like divorce against her husband on the ground of adultery, cruelty and desertion. By an order of the Court these two proceedings were joined and were proceeded with and on the 5th day of December, 1906, both cases came on for trial, on which said date the husband through his counsel, in open court, abandoned his proceeding for divorce and a decree in accordance with said abandonment was entered, dismissing his petition. Thereupon the Court proceeded to hear the petition of the wife and in said proceeding the counsel for the defendant Gerald Purcell Fitz Gerald did in open court state to the trial judge that the defendant would not contest the wife's petition for a divorce if the cause of divorce was confined to two grounds, viz., adultery with a person unknown and cruelty, but that if the said wife in her said petition, proceeded to establish any other ground or fact as a reason for said divorce the petition would be contested, whereupon the said wife did proceed with her case upon the said two grounds only, and on the 5th day of December did obtain a judgment and decree of the said Court divorcing her from her said husband a mensa et thoro. The contract sued upon was executed by the parties on the day following the said decree."

Ninth. The learned Court erred in refusing to find as requested by the defendant in his sixth request for findings of fact, which said request is as follows:

"After the execution of said contract, to wit: on the 4th day of March, 1907, the said plaintiff wife did present her petition to Parliament setting forth the fact that she had obtained a divorce a mensa et thoro and praying for an absolute divorce from the bonds of matrimony upon the ground of adultery upon the part of her husband with a person unknown and of his cruelty to her. The said grounds of divorce being in accordance with the stipulations and agreement made in open court by the counsel for the husband when the divorce a mensa et thoro was obtained. On the hearing of the said petition in Parliament the counsel for the said wife
229 did read to the committee of the House of Lords to which her
petition had been referred the statement of her husband's counsel in the Irish Court wherein he said that the husband would not contest the divorce if the charges of the wife were confined to those of adultery with a woman unknown and cruelty."

Tenth. The learned Court erred in refusing to find as requested by the defendant in his ninth request for findings of fact, which said request is as follows:

"The act of the said husband in withdrawing his proceedings against the wife in the Irish Court and in admitting the allegation by the wife in her proceeding in divorce for adultery with a person unknown and of cruelty and in not contesting said wife's proceeding was in consequence and in pursuance of the agreement between him and her made before the trial of the said cause."

Eleventh. The learned court erred in refusing to find as requested by the defendant in his tenth request for findings of fact, which said request is as follows:

"The said agreement between the said husband and wife as to said actions for divorce in the Irish Court and the said acts of the said husband and wife in the said proceedings consequent upon said agreement were part of the consideration for the contract of December 6, 1906, upon which the plaintiffs found their action."

Twelfth. The learned court erred in refusing without qualification, to find as requested by the defendant in his eleventh request for findings of fact, which said request is as follows:

"The proceedings by the wife by petition to Parliament to procure an act of Parliament dissolving the marriage relation was in consequence of the contract made by them on the 6th day of December, 1906, and was an indispensable consideration for the payment of the annuities and other sums of money for which the plaintiffs ask a decree of this court."

Thirteenth. The learned court erred in refusing to find as requested by the defendant in his twelfth request for findings of fact, which request is as follows:

230 "The contract of December 6, 1906, upon which the plaintiffs sue was in contemplation of said husband and wife and the procurement of the said act of Parliament dissolving the marriage relation was intended and contemplated and agreed to by the husband and wife on the 5th day of December 1906, when the case of

the said wife for divorce came on to be heard and when she obtained the decree of divorce a mensa et thoro and the said contract of December 6, 1906, was written ratification of the agreement previously made by the said husband and wife to that effect."

Fourteenth. The learned court erred in refusing to find as requested by the defendant in his thirteenth request for findings of fact, which request is as follows:

"The plaintiffs have offered no evidence to contradict the averments of fact contained in the defendant's answer."

Fifteenth. The learned court erred in refusing to state as a conclusion of law the defendant's sixth request for conclusions of law, which request is as follows:

"The agreement sued upon by the plaintiffs in this case dated December 6, 1906, is null and void as being founded upon the consideration that there shall be obtained by the wife an act of Parliament divorcing her from the bonds of matrimony with her husband, said contract being against public policy."

Sixteenth. The learned court erred in refusing to state as a conclusion of law the defendant's seventh request for conclusions of law, which request is as follows:

"The separate answer of the defendant Gerald Purcell Fitz Gerald is responsive to the plaintiffs' Bill in its 8th, 13th, 14th, 15th and 16th paragraphs, and being so responsive the burden was upon the plaintiff to overcome it by two witnesses or by one witness and corroborating facts and circumstances, and the plaintiffs not having done so it stands as true."

Seventeenth. The learned court erred in refusing to state as a conclusion of law the defendant's eighth request for conclusions of law, which request is as follows:

231 "The averments contained in the said defendant's separate answer in paragraphs 8, 13, 14, 15 and 16, being true as found in the foregoing finding constitute a complete defense to the plaintiffs' right to the relief asked for and the contract sued upon by the plaintiffs is null and void and cannot be enforced in this action."

Eighteenth. The learned court erred in refusing to state as a conclusion of law the defendant's ninth request for conclusions of law, which request is as follows:

"Under findings of fact and the findings of law made by the Court the bill must be dismissed."

Nineteenth. The learned court erred in refusing to state as a conclusion of law the defendant's tenth request for conclusions of law, which request is as follows:

"The contract of December 6, 1906, which is the foundation of the plaintiffs' bill does not constitute an equitable assignment of the profits of the Fayette Coke Company and the Shamrock Supply Company or any part thereof or of the properties of the same, because the defendants Fitz Gerald and Lenhart or either of them do not by said contract surrender possession and dominion over the said profits or properties or any part thereof, and the said contract is only a personal promise to pay upon the part of the said defendant Fitz Gerald the annuities and sums of money referred to in said agreement."

Twentieth. The learned court erred in its finding of fact as requested in plaintiffs' tenth request for findings of fact, which request is as follows:

"That by agreement, in writing and under seal, dated December 6, 1906, and recorded August 1, 1910, in Agreement Book Vol. 22, page 304, in the Recorder's Office of Fayette County aforesaid, the defendant, Gerald Purcell Fitz Gerald and the plaintiff Lida Eleanor Purcell Fitz Gerald duly and lawfully agreed with each other and with the plaintiff Josiah V. Thompson and the defendants Charles E. Lenhart and Gerald Purcell Fitz Gerald as Trustees, as set forth in the copy of said contract, contained within Paragraph Eight of the Bill of Complaint."

Twenty-first. The learned court erred in stating a conclusion of law, as requested in plaintiffs' first request for conclusions of
232 law, which is as follows:

"That the agreement of December 6, 1906, is in all respects valid and enforcible, and that there is payable to the trustees named therein, for the benefit of Lida Eleanor Purcell Fitz Gerald, the installments that have become due from and including the installment that became payable on June 30, 1910, to and including the instalment that became due on December 31, 1910 to the extent to which the same have been earned, to wit: to the amount of $16,450.00; and the trustees are entitled to a lien upon the interest of the defendant Fitz Gerald in the property of the Fayette Coke Company and to sequestrate his interest therein for the payment of said sum and of interest thereon from December 31, 1910; and to a lien upon said interest and to sequestrate the same for the satisfaction of any sums that may hereafter become payable under said agreement of December 6, 1909."

Twenty-second. The learned court erred in stating as a conclusion of law, as requested in plaintiffs' request for conclusions of law, which is as follows:

"That the aforesaid agreement of December 6, 1906, constitutes an equitable lien upon the interest of the defendant Fitz Gerald in the real property of the Fayette Coke Company described in the Bill, and in the profits and income derived from the operation thereof, for the benefit of the beneficiaries under the aforesaid agreement, to the extent of the payments therein provided for and to secure the payment of the sums by said agreement required to be paid."

Twenty-third. The learned court erred in stating as a conclusion of law, as requested in plaintiff's fifth request for conclusions of law, which is as follows:

"That the said defendant Fitz Gerald account for and pay over to the said trustees now in office and to the trustee to be appointed under the judgment or order to be entered hereafter in this action, all sums of money in his hands or for which he is accountable as trustee under the aforesaid agreement of December 6, 1906, and that the judgment to be entered upon these findings shall provide for the appointment of a Master or Referee to take and state the accounts of said defendant and that upon the coming in of such report judgment may be entered and enforced for the amount found due on such accounting."

Twenty-fourth. The learned court erred in finding, as
233 stated in the opinion of the Court, the following fact:

"While both parties seem to have been anxious to have an absolute divorce, and the said agreement touches on that subject to the extent of fixing certain necessary dates, yet we are satisfied and find as a fact that the primary and principal purposes were to settle and adjust the matter of permanent alimony and secure to Mr. Fitz Gerald a waiver of the said dower rights of his wife and to make provisions for the maintenance and future comfort of their children."

Twenty-Fifth. The learned court erred in holding that the defendant's answer was not responsive to the allegations of the complainants' bill, and did not require to be overcome by the testimony of two witnesses, or of one witness and corroborating circumstances.

Twenty-sixth. The learned court erred in concluding as a matter of law that the agreement of December 6, 1906 was a valid agreement, and that the same was not made through collusion and in contravention of public policy.

Twenty-seventh. The learned court erred in adjudging and decreeing as follows:

"That the defendant, Gerald Fitz Gerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell Fitz Gerald the sum of sixteen thousand four hundred and sixty dollars ($16,460.00), and that the said Trustees pay the same to Lida Eleanor Purcell Fitz Gerald."

Twenty-ninth. The learned court erred in adjudging and decreeing as follows:

"That the defendant, Gerald Purcell Fitz Gerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell Fitz Gerald and John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, minor children of the said defendant Gerald Purcell Fitz Gerald and of the said Lida Eleanor Purcell Fitz Gerald, the sum of Five Thousand three hundred and eighty-eight dollars ($5,388.00), upon the trusts set forth in Paragraph Third of
234 the agreement dated December 6, 1906, and set forth at large in the Bill filed herein."

Thirtieth. The learned court erred in adjudging and decreeing as follows:

"That the payments provided for in said agreement of December 6, 1906, be and the same are hereby adjudged to be a lien on all the right, title and interest of the defendant, Gerald Purcell Fitz Gerald, in and to the real property described in Paragraph Ninth of the Bill filed herein and known as the Fayette Coke Company property."

Thirty-first. The learned court erred in adjudging and decreeing as follows:

"That the defendant, Gerald Purcell Fitz Gerald be and he is hereby restrained and enjoined from in anywise alienating, encumbering or otherwise disposing of his interest in the property of the Fayette Coke Company and in the property of the Shamrock Supply Company unless and until there shall first have been accumulated in the hands of the Trustees under the said agreement of December 6, 1906, the sum of Three Hundred Thousand Dollars as provided by Paragraph Third of said agreement."

ROBINSON, McKEAN & MARTIN,
MICHAEL J. RYAN,
WILLIAM A. STONE,
JAMES GAY GORDON,
Counsel for Gerald Purcell Fitz Gerald.

Endorsement: 618 In Equity.—In the Court of Common Pleas of Fayette County—Sitting in Equity—No. 618.—Between Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, et al., Plaintiffs, and Gerald Purcell Fitz Gerald, individually and as Trustee, et al., Defendants.—Exceptions of Gerald Purcell Fitz Gerald, Defendant—Filed March 24, 1911—Robinson, McKean & Martin, Michael J. Ryan, William A. Stone, James Gay Gordon, Counsel for Gerald Purcell Fitz Gerald.

235 In the Court of Common Pleas of Fayette County, Sitting in Equity.

No. 618.

Between

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald. John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

Gerald Purcell Fitz Gerald, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners, as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants.

And now, to-wit, this 24th day of March, A. D. 1911, the defendant, Gerald Purcell Fitz Gerald, excepts to the rulings, findings and decree of the Court in the above case, and assigns the following causes of exception.

Thirty-second. The learned Court erred in adjudging and decreeing as follows:

"IV. That the defendant, Gerald Purcell Fitz Gerald, be 236 and he is hereby removed from his office as Trustee of the trusts created by said agreement of December 6th, 1906, and he is hereby directed to account for and pay over to Josiah V. Thompson and Charles E. Lenhart, Trustee of the Trusts created by said agreement of December 6, 1906, and to the Trustee to be hereafter chosen by them, the said Thompson and Lenhart, or appointed by the Court, in place of the said Gerald Purcell Fitz Gerald, all sums in his hand, or for which he is accountable under said agreement of December 6, 1906."

Thirty-third. The learned Court erred in adjudging and decreeing as follows:

"V. That Richard W. Dawson, Esq., be and he is hereby appointed Referee to take and state the account of the said defendant, Gerald Purcell Fitz Gerald, as Trustee as aforesaid and report the same to the Court and, upon final confirmation of said report that judgment be entered against the said Gerald Purcell Fitz Gerald for the amount found due on such accounting."

Thirty-fourth. The learned Court erred in adjudging and decreeing as follows:

"VI. That Josiah V. Thompson and Charles E. Lenhart, Trustees as aforesaid, are hereby directed to appoint some competent and judicious person as Trustee in place of the said Gerald Purcell Fitz Gerald within ten days; in case they are unable to agree, they shall report their disagreement to the Court forthwith at the expiration of said period of ten days."

Thirty-fifth. The learned Court erred in entering a decree in this case of its own motion, without prior service of a copy thereof on the solicitors for Gerald Purcell Fitz Gerald in accordance with the requirements of Rule 79 of the Rules of the Supreme Court in Equity.

ROBINSON, McKEAN & MARTIN,
MICHAEL J. RYAN,
WILLIAM A. STONE,
JAMES GAY GORDON,
Counsel for Gerald Purcell Fitz Gerald.

Endorsement: No. 618 In Equity—Between Josiah V. Thompson et al. and Gerald Purcell Fitz Gerald et al.—Additional Exceptions—Filed March 24, 1911—Robinson, McKean & Martin, Attorneys at Law, Uniontown, Pa.

237 In the Court of Common Pleas of Fayette County, Pennsylvania.

No. 618. In Equity.

JOSIAH V. THOMPSON, et al., etc.,
vs.
GERALD PURCELL FITZ GERALD et al., etc.

Now, March 31, 1911, this being the time fixed by the court for argument of the exceptions and additional exceptions of Gerald Purcell Fitz Gerald filed March 24, 1911 in this cause, the parties by their counsel appear and are heard: And now, April 1, 1911, thereupon upon consideration thereof, it is ordered, adjudged and decree that all of the said exceptions and additional exceptions be and the same are hereby overruled and dismissed.

BY THE COURT.

Attest:
WM. McCLELLAND,
Prothonotary.

Now April 1, 1911, the defendant Gerald Purcell Fitz Gerald by his counsel excepts to the foregoing order and at his instance a bill is sealed.

ROBERT E. UMBEL, [SEAL.]
President Judge.

Endorsement: No. 618 In Equity—J. V. Thompson et al. v. Gerald Purcell Fitz Gerald et al.—Order—Filed April 1, 1911.

238 In the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald of the Trusts within Described; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee of the Trusts within Described; Charles E. Lenhart, as Trustee of the Trusts within Described; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of the Fayette Coke Company and Shamrock Supply Company, Defendants.

Bond for Appeal.

Know all men by these presents, That we, Gerald Purcell Fitz Gerald, principal, and George S. Harah, of Uniontown, Fayette County, Pennsylvania, surety, are held and firmly bound unto the Commonwealth of Pennsylvania, to the use of all parties in interest, in the sum of Fifty thousand (50,000) Dollars, lawful money of the United States of America, to the payment of which to the said Commonwealth, her certain attorneys, or assigns, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and each of them, firmly by these presents.

Sealed with our seals and dated this Third day of April A. D. 1911.

Whereas, Gerald Purcell Fitz Gerald, one of the defendants in the above styled suit in equity, now depending in the Court of Common Pleas of Fayette County, has appealed from a decree of the said Court filed in said suit, to the Supreme Court of Pennsylvania.
239

Now the condition of this obligation is such, that if the appeal taken by the above-bounden Gerald Purcell Fitz Gerald from the decree of the Court of Common Pleas of Fayette County, be prosecuted with effect, and if the said appellant shall and will pay such sum as shall be found to be due to the Trustees above named by him, the said Gerald Purcell Fitz Gerald, Trustee, and all costs and damages awarded by the Appellate Court or legally chargeable against him, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

GERALD PURCELL FITZ GERALD. [SEAL.]
GEORGE S. HARAH. [SEAL.]

Signed, Sealed and Delivered in the presence of
HENRY J. REBMAN.
JAMES GAY GORDON.

COMMONWEALTH OF PENNSYLVANIA,
County of Fayette, ss:

On this Third day of April 1911, before the subscriber, a Notary Public in and for the county and state aforesaid, came George S. Harah, the surety named in the foregoing bond, who being first duly Sworn according to law, says that he is worth the amount of the penalty thereof over and above all liabilities and exemptions.

GEORGE S. HARAH.

Sworn to and subscribed before me, this 3rd day of April, A. D. 1911.

[SEAL.] HENRY J. REBMAN,
Notary Public.

Commission expires March 18th, 1913.

Endorsement: No. 618. In Equity—Between Thompson et al. and Fitz Gerald et al.—Bond for Appeal—April 5, 1911 within bond and surety approved. By the Court, R. E. Umbel, P. J.—Filed April 5, 1911.

240 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1911.

No. 109.

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs Below and Appellees.

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants Below and Appellants.

And now, to wit: this 4th day of April, A. D. 1911, comes the defendant, Gerald Purcell Fitz Gerald, by his attorneys, and in support of the appeal taken in his behalf in the above-entitled cause, makes the following

Assignments of Error.

First. The learned Court erred in overruling the motion of the defendant, at the conclusion of the plaintiffs' case, to dismiss the plaintiffs' Bill.

Second. The learned Court erred in refusing to state as a conclusion of law, the defendant's seventh request for conclusions of law, which request was as follows:

"The separate answer of the defendant Gerald Purcell Fitz Gerald is responsive to the Plaintiffs' Bill in its 8th, 13th, 14th, 15th and 16th paragraphs, and being so responsive the burden was upon the plaintiff to overcome it by two witnesses or by one witness and corroborating facts and circumstances, and the plaintiffs not having done so it stands as true."

241 Third. The learned Court erred in refusing to state as a conclusion of law, the defendant's eighth request for conclusions of law, which request was as follows:

"The averments contained in the said defendant's separate answer in paragraphs 8, 13, 14, 15 and 16, being true as found in the foregoing finding constitute a complete defence to the plaintiff's right to the relief asked for and the contract sued upon by the plaintiffs is null and void and cannot be enforced in this action."

Fourth. The learned Court erred in refusing to find as requested by the defendant in his thirteenth request for findings of fact, which request is as follows:

"The plaintiffs have offered no evidence to contradict the averments of fact contained in the defendant's answer."

Fifth. The learned Court erred in concluding as a matter of law that the agreement of December 6, 1906 was a valid agreement, and that the same was not made through collusion and in contravention of Public Policy.

Sixth. The learned Court erred in overruling the defendant's objection to the following offer of proof:

"Mr. UNTERMYER: I now offer in evidence, duly authenticated, under the hand and seal of the American Consul for Great Britain, at Dublin, Ireland, the following documents: 1st, the judgment of the High Court of Justice of Ireland, King's Bench Division, before the Honorable Lord Chief Justice, Lord O'Bryon, in the case of Lida Eleanor Purcell Fitz Gerald vs. Gerald Purcell Fitz Gerald, on the 5th day of December, 1906, being Exhibit No. 3.

2nd, a like authenticated record of the proceedings before Lord Chief Justice resulting in the verdict, being Exhibit No. 4.

3rd, the pleadings in the action referred to, being the Petition or Bill of Complaint, the Answer and the Bill of Particulars, together with the notice of rejoinder of issue between the parties. The pleadings consisting of the Petition of Mrs. Fitz Gerald, the Answer of Gerald Purcell Fitz Gerald and the Rejoinder of the Petitioner in the suit against Mr. Fitz Gerald; also the petition of Gerald Purcell Fitz Gerald, the Answer of Mrs. Fitz Gerald and the Rejoinder by

Mr. Fitz Gerald in the suit brought by him in the High Court of Justice in Ireland, being the suit referred to in the proceedings that have been offered, it appearing that both suits came to trial at or about the same time.

The petition or Bill of Complaint in the suit by Mrs. Fitz Gerald against Mr. Fitz Gerald marked Plaintiffs' Exhibit No. 8; the Answer by Mr. Fitz Gerald in the same suit; marked Exhibit No. 9;

The Bill of Particulars in the same suit, marked Plaintiffs'
242 Exhibit No. 10; the notice of Rejoinder of Issue in the same
suit marked Plaintiffs' Exhibit No. —; The petition in the suit brought by Mr. Fitz Gerald against Mrs. Fitz Gerald, marked Plaintiffs' Exhibit No. 6;

The answer by Mrs. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 5; Rejoinder by Mr. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 7.

Judge Gordon: I do not know whether that is the complete record or not. Under the practice in this country a certification or exemplification of the record would be, under the certificate of the proper officer, that 'the foregoing is the entire record of the proceedings as the same appears before us of record'; there is no such certificate here—each of these separate papers, one a transcript and certification of the pleadings, another a detached certification of the decree, being obviously not the exemplification of the record but the certificate of the clerk of court as what the decree, in effect contains; these things are offered in this detached and incomplete fashion and I object to them unless there is evidence that they are the complete record, and it must be presented in its entirety or not at all. I object to it because of its physical incompleteness and detachment, so that your Honor is unable to say whether it is a complete record or not. This is a judicial proceeding in the High Court of Justice in Ireland—if anything is offered it must be all offered as the record and I object to this in its present form.

Mr. Untermyer: They are certified both by the Court and the shorthand writer to be the proceedings at the trial, and you will find that the proceedings are certified in like manner and the decree is also certified in like manner.

By the Court: We will allow them to be marked as exhibits and admitted, and will overrule the objection with an exception for the defendants."

Seventh. The Learned Court erred in rejecting the defendant's offer of proof as follows:

Judge Gordon: "I offer to prove in support of my objection to the admission of these records that they do not constitute the whole record of the case of which they are a part.

Mr. Untermyer: Will counsel specify in what respect the records are incomplete?

Judge Gordon: The record is not complete in that it does not show all the testimony taken upon the issue in the case; it does not show the testimony taken by the plaintiff on commission to the United States; it does not show the abandonment of the proceedings and the period when the petition of the parties as hostile litigants ceased, and the story and history of the litigation is not disclosed by this record.

Mr. UNTERMYER: Is it contended that any testimony taken on commission was offered as part of the proceeding at the trial of the action? Is it contended by counsel upon the other side that the exhibit which has been offered as being a record of the proceedings at the trial is not a proper and correct record of what took place at the trial and the testimony that was there offered—is there such contention?

Judge GORDON: There is the contention that Mr. Untermyer has no authority to determine how much of the record is relevant and how much is irrelevant. Your Honor must decide that. 243 The assurance of a member of the Bar saying that he determines that he will leave out certain parts as being incompetent and irrelevant——

Mr. UNTERMYER: Your Honor, we object to this on the ground that the record apears to be, we believe it to be, and insist that it is, the complete record of the proceedings and of the decree and if it is not it lies with the other side to rebut the presumption raised by the certificate.

By the COURT: For the present the objection is sustained, with an exception for the respondent.

Eighth. The learned Court erred in refusing to state as a conclusion of law the defendant's tenth request for conclusions of law, which request was as follows:

"The contract of December 6, 1906, which is the foundation of the plaintiffs' bill does not constitute an equitable assignment of the profits of the Fayette Coke Company and the Shamrock Supply Company or any part thereof or of the properties of the same, because the defendants Fitz Gerald and Lenhart, or either of them, do not by said contract surrender possession and dominion over the said properties or any part thereof, and the said contract is only a personal promise to pay upon the part of the defendant Fitz Gerald the annuities or sums of money referred to in the said agreement."

Ninth. The learned Court erred in entering any decree in favor of the plaintiffs or against the defendant under the pleadings and evidence in the case.

Tenth. The learned Court erred in entering a decree in this case of its own motion, without prior service of a copy thereof on the solicitors for Gerald Purcell Fitz Gerald in accordance with the requirements of Rule 84 of the Rules of the Supreme Court in Equity.

Eleventh. The Learned Court erred in refusing upon the petition of the defendant, Gerald Purcell Fitz Gerald, to proceed no further in the said suit, and to transfer the said suit to the Circuit Court of the United States for the Western District of Pennsylvania.

H. L. ROBINSON,
MICHAEL J. RYAN,
WILLIAM A. STONE,
JAMES GAY GORDON,
Counsel for Gerald Purcell Fitz Gerald, Appellant.

244 Endorsement: No. 618. In Equity.—In the Supreme Court of Pennsylvania for the Eastern District—No. 109 January Term, 1911—Between Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, et al., Plaintiffs, and Gerald Purcell Fitz Gerald, individually and as Trustee, et al., Defendant—Assignments of error—Filed April 5, 1911—Robinson, McKean & Martin, Michael J. Ryan, William A. Stone, James Gay Gordon, Counsel for Gerald Purcell Fitz Gerald.

245 I, Robert E. Umbel, President Judge of the Court of Common Pleas of Fayette County, before whom the above styled case was heard, hereby certify that the value of the land or the title to real property, really in controversy in the above styled case, is greater than $1500.00, exclusive of costs. This certificate is made pursuant to the Act of General Assembly of May 5, 1899.

ROBERT E. UMBEL, [SEAL.]
President Judge.

Endorsement: No. 618. In Equity—Josiah V. Thompson as Trustee for Lida Eleanor Purcell Fitz Gerald et al., Pl'ffs v. Gerald Purcell Fitz Gerald, individually and as Trustee et al., Def'ts.—Certificate of Robert E. Umbel, P. J. as to value of land being over $1500.00—Filed April 5, 1911.

246 COMMONWEALTH OF PENNSYLVANIA,
Fayette County, ss:

I, William McClelland, Prothonotary of the Court of Common Pleas in and for said County, certify that the foregoing is a full and correct copy of the Equity Docket Entries of the case therein stated, wherein Josiah V. Thompson as Trustee etc. et al., Plaintiff, and Gerald Purcell Fitz Gerald and Charles E. Lenhart as partners etc. et al., Defendant, as the same remains of record before the said Court, at No. 618 In Equity.

In testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Uniontown, the Sixth day of April, A. D. 1911.

[SEAL.] WM. McCLELLAND,
Prothonotary.

247

Docket Entries.

January Term, 1911.

109.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Plaintiffs,

v.

GERALD PURCELL FITZ GERALD, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald, and Charles E. Lenhart, Partners as Fayette Company, and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company, and Shamrock Supply Company, Defendants.

Appeal of Gerald Purcell Fitz Gerald.

No. 618. In Equity.

Appeal from Court of Common Pleas of the County of Fayette.

Filed April 3, 1911.

H. L. Robinson, Michael J. Ryan, William A. Stone, James J. Gordon.

Eo die.—Certiorari exit, ret'ble second Monday of May, 1911.
April 4, 1911.—Assignments of error filed.
April 11, 1911.—Record returned and filed.
May 9, 1911.—Argued.
May 10, 1911.—Agreement of counsel filed.
W. J. Sturgis, Att'y for Plaintiffs.
H. L. Robinson, Att'y for Defendant.
Approved: Robert E. Umbel, President Judge.
July 6, 911.—Decree affirmed at appellant's costs. Per Curiam.
July 10, 1911.—Petition for re-hearing filed.
Michael J. Ryan, James Jay Gordon, Att'ys for G. P. Fitz Gerald.
October 6, 1911.—Petition dismissed. Per Curiam.

248 In the Supreme Court of Pennsylvania for the Eastern District.

Court of Common Pleas of the County of Fayette, Sitting in Equity.

No. 618.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, & Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Plaintiffs,

—

GERALD PURCELL FITZ GERALD, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette — Company, and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company, and Shamrock Supply Company, Defendants.

Enter Appeal on behalf of Gerald Purcell Fitzgerald, from the decree of the Court of Common Pleas (in Equity) of the County of Fayette.

H. L. ROBINSON.
MICHAEL J. RYAN.
WILLIAM A. STONE.
JAMES GAY GORDON.

To James T. Mitchell, Prothonotary Supreme Court Eastern District.

COUNTY OF PHILADELPHIA, *ss:*

Michael J. Ryan, attorney for Gerald Purcell Fitz Gerald, being duly sworn saith that said Appeal is not taken for the purpose of delay, but because Appellant believes he has suffered injustice by the decree from which he appeals.

MICHAEL J. RYAN.

Sworn and subscribed this 3rd day of April A. D. 1911.

[SEAL.] HENRY J. REBMAN,
Notary Public.

Commission expires March 13th, 1913.

249 Endorsement: No. 109 January Term, 1911—Supreme Court of Pensylvania Eastern District—Josiah V. Thompson, Trusteee et al. vs. Gerald Purcell Fitz Gerald, et al.—Appeal and Affidavit—Filed Apr. 3-1911. In Supreme Court—H. L. Robinson, Michael J. Ryan, William A. Stone, James Gay Gordon Attorney- for Appellant.

250 In the Supreme Court of Pennsylvania for the Eastern District.

No. 618.

GERALD PURCELL FITZGERALD, Appellant,

—

—— ——.

Ceritorari to the Court of Common Pleas of the County of Fayette, Sitting in Equity.

Issue Certiorari to the Court of Common Pleas (in equity) of the County of Fayette to bring up record and proceedings in a certain action in said Court, No. 618 (in equity) Wherein Josiah V. Thompson, et al., are Plaintiffs and Gerald Purcell Fitz Gerald, et al. are Defendants Returnable to next Term. Sec. Reg.

H. L. ROBINSON.
MICHAEL J. RYAN.
WILLIAM A. STONE.
JAMES GAY GORDON.
Attorneys for Appellant.

To James T. Mitchell, Prothonotary Supreme Court, Eastern District.

Endorsement: No. 109 January Term, 1911—Supreme Court of Pennsylvania Eastern District—Josiah V. Thompson Trustee, et al. vs. Gerald Purcell Fitz Gerald—Præcipe for certiorari—Filed Apr. 3-1911. In Supreme Court—H. L. Robinson, Michael J. Ryan, William A. Stone, James Gay Gordon, Attorneys for Appellant.

251 EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss:

The Commonwealth of Pennsylvania to the Justices of the Court of Common Pleas, No. —, for the County of Fayette, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of Gerald Purcell Fitz Gerald from the decree in No. 618 In Equity, wherein Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald and Gerald Purcell Fitz Gerald, infants by William McClelland, their Guardian ad litem were plaintiffs and The said appellant, individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, partners as Fayette Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company were defendants, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the second Monday of May next 1911, so full and entire as in our Court before you they remain, you certify and send, together with this Writ that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable D. Newlin Fell, Chief Justice of our said Supreme Court, at Philadelphia, the third day of April in the year of our Lord one thousand nine hundred and eleven.

ALFRED B. ALLEN,
Deputy Prothonotary.

252 Endorsement: No. 618 In Equity—C. P. Fayette County—No. 109 January Term, 1911—Supreme Court—Josiah V. Thompson as Trustee, &c. et al. v. Gerald Purcell Fitz Gerald, et al—Gerald Purcell Fitz Gerald, Appellant—Certiorari to the Court of Common Pleas for the County of Fayette. Returnable the second Monday of May, 1911—Rule on the Appellee, to appear and plead on the Return-day of the Writ. Alfred B. Allen, Deputy Prothonotary—Service of above rule and notice of appeal accepted Apr. 5, 1911. Reppert, Sturges & Morrow., of Counsel for Pl'ffs.—Filed April 5, 1911—Filed Apr. 11, 1911, in Supreme Court—H. L. Robinson, Michael J. Ryan, William A. Stone, James Gay Gordon.

To the Honorable the Judges of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

ROBERT E. UMBEL. [L. S.]
JOHN D. VAN SWEARINGEN. [L. S.]

I certify, that George S. Harah is surety in the within case, in the sum of Fifty thousand Dollars. Wm. McClelland, Prothonotary.

253 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1911.

No. 109.

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, their Guardian ad Litem, Plaintiffs Below and Appellees,

and

GERALD PURCELL FITZ GERALD, Individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell Fitz Gerald and Charles E. Lenhart, Partners as Fayette Coke Company, and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company, and Shamrock Supply Company, Defendants Below and Apellants.

And now, to wit: this 4th day of April, A. D. 1911, comes the defendant, Gerald Purcell Fitz Gerald, by his attorneys, and in support of the appeal taken in his behalf in the above-entitled cause, makes the following

Assignments of Error.

First. The Learned Court erred in overruling the motion of the defendant, at the conclusion of the plaintiffs' case, to dismiss the plaintiffs' Bill.

Second. The Learned Court erred in refusing to state as a conclusion of law, the defendant's seventh request for conclusions of law, which request was as follows:

"The separate answer of the defendant Gerald Purcell Fitz Gerald is responsive to the plaintiffs' Bill in its 8th, 13th, 14th, 15th and 16th paragraphs, and being so responsive the burden was upon the plaintiff to overcome it by two witnesses or by one witness and corroborating facts and circumstances, and the plaintiffs not having done so it stands as true."

254 Third. The Learned Court erred in refusing to state as a conclusion of law, the defendant's eighth request for conclusions of law, which request was as follows:

"The averments contained in the said defendant's separate answer in paragraphs 8, 13, 14, 15, and 16, being true as found in the foregoing finding constitute a complete defense to the plaintiff's right to the relief asked for and the contract sued upon by the plaintiffs is null and void and cannot be enforced in this action."

Fourth. The learned Court erred in refusing to find as requested by the defendant in his thirteenth request for findings of fact, which request is as follows:

"The plaintiffs have offered no evidence to contradict the averments of fact contained in the defendant's answer."

Fifth. The Learned Court erred in concluding as a matter of law that the agreement of December 6, 1906, was a valid agreement, and that the same was not made through collusion and in contravention of Public Policy.

Sixth. The Learned Court erred in overruling the defendant's objection to the following offer of proof:

"Mr. UNTERMEYER: I now offer in evidence, duly authenticated, under the hand and seal of the American Consul for Great Britain, at Dublin, Ireland, the following documents: 1st, the judgment of the High Court of Justice of Ireland, King's Bench Division, before the Honorable Lord Chief Justice, Lord O'Bryon, in the case of Lida Eleanor Purcell Fitz Gerald v. Gerald Purcell Fitz Gerald, on the 5th day of December, 1906, being Exhibit No. 3.

2nd, a like authenticated record of the proceedings before Lord Chief Justice resulting in the verdict, being Exhibit No. 4.

3rd, the pleadings in the action referred to, being the Petition or Bill of Complaint, the Answer and the Bill of Particulars, together with the notice of rejoinder of issue between the parties. The pleadings consisting of the petition of Mrs. Fitz Gerald, the Answer of Gerald Purcell Fitz Gerald and the Rejoinder of the Petitioner in the suit against Mr. Fitz Gerald; also the petition of Gerald Purcell Fitz Gerald, the Answer of Mrs. Fitz Gerald and the Rejoinder by Mr. Fitz Gerald in the suit brought by him in the High Court of Justice in Ireland, being the suit referred to in the proceedings that have been offered, it appearing that both suits came to trial at or about the same time.

The petition or Bill of Complaint in the suit by Mrs. Fitz Gerald against Mr. Fitz Gerald marked Plaintiffs' Exhibit No. 8; the Answer by Mr. Fitz Gerald in the same suit; marked Exhibit No. 9; the Bill of Particulars in the same suit, marked Plaintiffs' Exhibit No. —; The Rejoinder by Mrs. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 10; the notice of Rejoinder of Issue in the same suit marked Plaintiffs' Exhibit No. —; The petition in the suit brought by Mr. Fitz Gerald against Mrs. Fitz Gerald, marked Plaintiffs' Exhibit No. 6;

255 The Answer by Mrs. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 5, Rejoinder by Mr. Fitz Gerald in the same suit, marked Plaintiffs' Exhibit No. 7.

Judge GORDON: I do not know whether that is the complete record or not. Under the practice in this country a certification or exemplification of the record would be, under the certificate of the proper officer, that 'the foregoing is the entire record of the proceedings as the same appears before us of record;' there is no such certificate here—each of these separate papers, one a transcript and certification of the pleadings, another a detached certification of the decree, being obviously not the exemplification of the record, but the certificate of the clerk of court as what the decree, in effect, contains; these things are offered in this detached and incomplete fashion and I object to them unless there is evidence that they are the complete record, and it must be presented in its entriety or not at all, I object to it because of its physical incompleteness and detachment, so that your Honor is unable to say whether it is a complete record or not. This is a judicial proceeding in the High Court of Justice in Ireland—if anything is offered it must be all offered as the record and I object to this in its present form.

Mr. UNTERMEYER: They are certified both by the Court and the shorthand writer to be the proceedings at the trial, and you will find that the proceedings are certified in like manner.

By the COURT: We will allow them to be marked as Exhibits and admitted, and will overrule the objection with an exception for the defendants."

Seventh. The Learned Court erred in rejecting the defendant's offer of proof as follows:

"Judge GORDON: I offer to prove in support of my objection to the admission of these records that they do not constitute the whole record of the case of which they are a part.

Mr. UNTERMEYER: Will counsel specify in what respect the records are incomplete?

Judge GORDON: The record is not complete in that it does not show all the testimony taken upon the issue in the case; it does not show the testimony taken by the plaintiff on commission to the United States; it does not show the abandonment of the proceedings and the period when the petition of the parties as hostile litigants ceased, and the story and history of the litigation is not disclosed by this record.

Mr. UNTERMEYER: Is it contended that any testimony taken on commission was offered as part of the proceeding at the trial of the action? Is it contended by counsel upon the other side that the exhibit which has been offered as being a record of the proceedings at the trial is not a proper and correct record of what took place at the trail and the testimony that was there offered—is there such contention?

Judge GORDON: There is the contention that Mr. Untermeyer has no authority to determine how much of the record is relevant and how much is irrelevant. Your Honor must decide that. The assurance of a member of the Bar saying that he determines that he will leave out certain parts as being incompetent and irrelevant——

Mr. UNTERMEYER: Your Honor, we object to this on the ground that the record appears to be, we believe it to be, and insist that it is, the complete record of the proceedings of the decree and 256 if it is not it lies with the other side to rebut the presumption raised by the certificate.

By the COURT: For the present the objection is sustained, with an exception for the respondent.

Eighth. The Learned Court erred in refusing to state as a conclusion of law the defendant's tenth request for conclusions of law, which request was as follows:

"The contract of December 6, 1906, which is the foundation of the plaintiff's bill does not constitute an equitable assignment of the profits of the Fayette Coke Company and the Shamrock Supply Company or any part thereof or of the properties of the same, because the defendants Fitz Gerald and Lenhart, or either of them, do not by said contract surrender possession and dominion over the said properties or any part thereof, and the said contract is only a personal promise to pay upon the part of the defendant Fitz Gerald the annuities or sums of money referred to in the said agreement."

Ninth. The Learned Court erred in entering any decree in favor of the plaintiffs or against the defendant under the pleadings and evidence in the case.

Tenth. The Learned Court erred in entering a decree in this case of its own motion, without prior service of a copy thereof on the solicitors for Gerald Purcell Fitz Gerald in accordance with the requirements of Rule 84 of the Rules of the Supreme Court in Equity.

Eleventh. The Learned Court erred in refusing upon the petition of the defendant, Gerald Purcell Fitz Gerald, to proceed no further in the said suit, and to transfer the said suit to the Circuit Court of the United States for the Western District of Pennsylvania.

H. L. ROBINSON,
MICHAEL J. RYAN,
WILLIAM A. STONE,
JAMES GAY GORDON,
Counsel for Gerald Purcell Fitz Gerald, Appellant.

Endorsement: In the Supreme Court of Pennsylvania for the Eastern District. No. 109, January Term, 1911. Between Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, et al., Plaintiffs and Gerald Purcell Fitz Gerald, individually and as Trustee, et al., Defendant. Assignments of Error. Filed Apr. 4, 1911. In Supreme Court. Robinson, McKean & Martin, Michael J. Ryan, William A. Stone, James Gay Gordon, Counsel for Gerald Purcell Fitz Gerald.

257 In the Court of Common Pleas of Fayette County.

No. 618, Sitting in Equity.

Between
THOMPSON et al., Plaintiffs,
and
FITZGERALD et al., Defendants.

It is hereby stipulated and agreed between the counsel for the parties in the above-entitled cause, as follows:

First. That the separate answer of the defendant, Gerald Purcell Fitz Gerald, which was filed in the above cause with the Prothonotary of the said Court, on the 30th day of November, A. D. 1910, has been lost or mislaid, and cannot be found.

Second. That the said answer, so filed, was sworn to by the said defendant, Gerald Purcell Fitz Gerald.

Third. That the copy of the said Answer, sent to the Supreme Court by the Prothonotary, in compliance with the writ of Certiorari, is a true and correct copy of the said Answer, except as to the jurat, which is omitted therefrom.

258 Fourth. That the copy of the said Answer, so sent to the Supreme Court with the record, shall be taken and received as though the same was in all respects a true and correct copy of the original Answer filed in the said cause.

Fifth. This agreement shall be filed of record in the cause, in the Supreme Court.

W. J. STURGIS,
Attorneys for Plaintiffs.
H. L. ROBINSON,
Attorneys for Defendant, Gerald Purcell Fitz Gerald.

Approved:
ROBERT E. UMBEL,
President Judge.

Endorsement: No. 109, January Term, 1911. In the Supreme Court of Pennsylvania. Josiah V. Thompson, et al. vs. Gerald Purcell Fitz Gerald et al. Agreement of Counsel. Filed May 10, 1911. In Supreme Court.

258½ In the Supreme Court of Pennsylvania, Eastern District, January Term, 1911.

No. 109.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem,

v.

GERALD PURCELL FITZ GERALD.

Appeal from C. P. Fayette.

Filed July 6, 1911.

Per Curiam:

A majority of this court agree with the court below that the answer of the defendant was not responsive to the bill, and that, under the facts found, no one of which has been assigned as error, the conclusions reached by the learned chancellor were correct. The offer of evidence complained of by the sixth assignment was properly allowed, and the rejection complained of by the seventh was proper. As this is not a controversy wholly between citizens of different states, the petition of the appellant for a transfer of the proceeding to the circuit court of the United States for the western district of Pennsylvania could not have been allowed.

Decree affirmed at appellant's costs.

259 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1911.

No. 109.

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald; Lida Eleanor Purcell Fitz Gerald, John Purcell Fitz Gerald, Edward Maurice Fitz Gerald, and Gerald Purcell Fitz Gerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs Below and Appellees,

vs.

Gerald Purcell Fitz Gerald, Defendant Below and Appellant.

Appeal of Gerald Purcell Fitz Gerald from the Court of Common Pleas of Fayette County.

No. 618. In Equity.

Petition for Rehearing.

To the Honorable the Chief Justice and Justices of the said Court:

The petition of Michael J. Ryan and James Gay Gordon respectfully shows:

That they were of counsel for the defendant, Gerald Purcell Fitzgerald, in the above appeal, which was argued in this Court on the 9th day of May, 1911.

That on the 6th day of July, 1911, the Court filed a per curiam decision on said appeal, in the following language:

"A majority of this Court agree with the court below that
260 the answer of the defendant was not responsive to the Bill and that under the facts found, no one of which has been assigned as error, the conclusions reached by the learned Chancellor were correct. The offer of evidence complained of in the sixth assignment was properly made, and the rejection complained of by the seventh was proper. As this is not a controversy wholly between citizens of different states, the petition of the appellant for a transfer of the proceedings to the Circuit Court of the United States for the Western District could not have been allowed.

Decree affirmed."

Your petitioners respectfully show to the Court that the said judgment and decree, above referred to, disposes of only four questions raised by the eleven assignments of error and leaves undecided and undisposed of certain other questions raised by said assignments, which are wholly distinct from and unaffected by the questions decided by the Court and which, if sustained, would require a reversal of the judgment of the court below, in whole or in part. The questions so left undisposed of are as follows:

First. Whether the contract sued upon by the plaintiffs was, on its face and by its terms against public policy and void, which said question was raised by the fifth assignment of error, which assignment was as follows:

"5. The learned Court erred in concluding, as a matter of law, that the agreement of December 6, 1906, was a valid agreement, and that same was not made through collusion and in contravention of public Policy."

That the said proposition of law was also raised by the first assignment of error, which assignment was as follows:

"1. The learned Court erred in overruling the motion of the defendant at the conclusion of plaintiffs' case to dismiss plaintiffs' bill."

Second. A further question left undisposed of by the Court was that raised by the eighth assignment of error, which said assignment was as follows:

261 "8. The learned Court erred in refusing to state as a conclusion of law the defendant's tenth request for conclusions of law, which request was as follows:

'The contract of December 6, 1906, which is the foundation of the plaintiffs' bill does not constitute an equitable assignment of the profits of the Fayette Coke Company and the Shamrock Supply Company or any part thereof or of the properties of the same, because the defendants, Fitz Gerald and Lenhart or either of them, do not by said contract surrender possession and dominion over the said properties or any part thereof, and the said contract is only a personal promise to pay upon the part of the said Fitz Gerald the annuities or sums of money referred to in said agreement.' "

Third. The third question left undisposed of by the Court is that which arose under the eleventh assignment of error, which was to the refusal of the lower Court to transfer the suit to the Circuit Court for the Western District of Pennsylvania.

It was contended under said assignment of error that though one of the parties defendant was of like citizenship with the plaintiff yet, nevertheless, as his interests are identical with that of the plaintiffs, a re-alignment of the parties, according to their interests, would have made the foreign defendant, Fitz Gerald, the sole defendant, and that, therefore, the cause should have been transferred to the United States Court. This proposition is left undecided by your Honorable Court.

Fourth. A further question left undecided is whether, in view of the denial by the defendant of the averment of the plaintiff that the agreement, on which suit was brought, was entered into for "good and valuable considerations", the Court below could properly, under the pleadings and evidence, have entered a decree in favor of the plaintiff. This point was raised by appellant's ninth assignment of error, which assignment was as follows:

262 "9. The learned Court erred in entering any decree in favor of the plaintiff or against the defendant, under the pleadings and evidence in the case."

Your petitioners respectfully show to the Court that all of the above facts are matters apparent on the record of the cause. They also show to the Court that none of the said undisposed of questions are at all answered by anything contained in the decision and judgment filed by the Court. Neither does the said decision and judgment render the said questions irrelevant, but that the same are vital and necessary questions and that until they are disposed of, no final judgment should be entered in the cause, and that if the appellant's contention upon said questions shall be sustained by the Court on a rehearing, a reversal of the Court below would be necessary notwithstanding the propositions decided by your Honorable Court and the decision and judgment already filed.

Your petitioners further show to the Court that their client, the said Gerald Purcell Fitz Gerald, is a resident of Ireland, where he resides, and now is, and, therefore, this petition is made on his behalf by counsel.

Wherefore, your petitioners respectfully pray your Honorable Court that a re-hearing and argument of said cause be granted, and that meantime, the record of the cause be not remitted to the Court of Common Pleas of Fayette County.

And they will ever pray, etc.

MICHAEL J. RYAN,
JAMES GAY GORDON,
Pro Appellant.

263 January Term, 1911.

No. 109.

THOMPSON et al.
vs.
FITZGERALD.

And now, —— —, 1911, upon consideration of the foregoing petition, and on motion of Michael J. Ryan, Esq., and James Gay Gordon, Esq., counsel for Gerald Purcell Fitzgerald, defendant, a rule is granted upon the plaintiff to show cause why a re-argument of the above entitled case should not be had, returnable at Pittsburgh, October —, ——, and the Prothonotary is hereby directed to hold the Record in said case pending the disposition of said Rule.

Endorsement: No. 109, January Term, 1911. In the Supreme Court of Penn'a for the Eastern District. Thompson, et al. vs. Fitzgerald. Petition for Re-hearing. "Petition dismissed. Per Curiam. Oct. 6, 1911. Filed Jul- 10, 1911. In Supreme Court. Michael J. Ryan. James Gay Gordon, Att'ys for Gerald Purcell Fitzgerald.

264 STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Record in the above case, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 31st day of October, A. D. 1911.

[Seal of the Supreme Court of Pennsylvania, Eastern District. 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

265 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Alfred B. Allen, was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this First day of November one thousand nine hundred and eleven.

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this First day of November one thousand nine hundred and eleven.

[Seal of the Supreme Court of Pennsylvania, Eastern District. 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

Endorsed on cover: File No. 22,925. Pennsylvania Supreme Court. Term No. 849. Gerald Purcell Fitz Gerald, plaintiff in error, vs. Josiah V. Thompson, as trustee for Lida Eleanor Purcell Fitz Gerald et al. Filed November 4th, 1911. File No. 22,925.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 849

Office Supreme Court, U.
FILED.
NOV 28 1911
JAMES H. McKENN
CLE

GERALD PURCELL FITZGERALD, individually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell FitzGerald and Charles E. Lenhart, partners of Fayette Coke Company and Shamrock Supply Company, Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants below,

vs.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, infants, by William McClelland, their Guardian, *ad Litem*,

Plaintiffs below and Appellees.

APPEAL BY DEFENDANT GERALD PURCELL FITZGERALD.

APPELLEES' BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

SAMUEL UNTERMYER,
WILLIAM J. STURGIS,
IRWIN UNTERMYER,
Counsel for Appellees.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States,

DECEMBER TERM, 1911.

No. 849.

GERALD PURCELL FITZGERALD, invidually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell FitzGerald and Charles E. Lenhart, partners of Fayette Coke Company and Shamrock Supply Company, Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants below.

vs.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, infants, by William McClelland, their Guardian *ad Litem*,

Plaintiffs below and Appellees.

Appellees' Brief in Support of Motion to Dismiss or Affirm.

This is a motion under Section 5 of Rule 6 to dismiss a writ of error to the Supreme Court of the State of Pennsylvania, coupled with a motion to affirm the judgment of that Court upon the ground that it is manifest that the appeal is taken for the purpose of delay only and upon the further ground that the question on which the jurisdiction of this Court depends is so frivolous as not to require further argument.

The bill of complaint alleges the execution of a contract entered into on the 6th day of December, 1906, in contemplation of an Act of Parliament divorcing the parties, whereby it was stipulated that a certain proportion of the defendant's share in the profits annually accruing from the Fayette Coke Company and the Shamrock Supply Company were to be paid by the defendant to three trustees designated in the agreement and by them applied to the use of the plaintiff Lida Eleanor FitzGerald and her infant children.

The trustees designated in the agreement are the defendant Gerald Purcell FitzGerald, the defendant Charles E. Lenhart and the plaintiff Josiah V. Thompson.

The bill alleges that the defendant FitzGerald has repudiated his obligations under the agreement of December 6, 1906 and that the defendant Lenhart acting under his instructions refuses to apply the funds in his possession as required by the terms of the trust.

The bill prays for the removal of the defendants FitzGerald and Lenhart as trustees; for the construction of the trust agreement; for an accounting by the defendants FitzGerald and Lenhart, and for the declaration and establishment of a lien on the property dedicated, under the terms of the agreement, to the performance of the conditions of the trust.

The citizenship of the parties is not in dispute. Two of the plaintiffs, Josiah V. Thompson and Lida Eleanor Purcell FitzGerald and one of the defendants, Charles E. Lenhart, are citizens of the State of Pennsylvania. The infant plaintiffs are aliens and residents of Great Britain and their Guardian *ad litem*, William McClelland, is a citizen of the State of Pennsylvania. The defendant FitzGerald is an alien and a resident of Great Britain.

A motion was made by the appellant in the Court of Common Pleas of Fayette County, Pennsylvania, for the removal of the cause to the Circuit Court of the United States. This motion was denied and the ruling of the Court upon this motion was affirmed by the Supreme Court of Pennsylvania.

POINTS.

I.

The petition for the removal of the case to the Circuit Court of the United States on the ground of the diversity of the citizenship of the parties was properly denied, the defendant FitzGerald being an alien.

It is evident that in no event should the cause have been removed to the Circuit Court on the ground of the diversity of the citizenship of the parties unless the cause of action as disclosed by the pleadings in the case against FitzGerald was separable from that against Lenhart and could have been fully determined without the joinder of Lenhart as a co-defendant and that the joinder of Lenhart was unnecessary and was accomplished for the purpose of preventing the Federal Court from acquiring jurisdiction.

Conceding either or both of these contingencies, the petition for removal was nevertheless properly denied because the defendant FitzGerald is an alien and is therefore not a citizen of any State within the meaning of the Removal Act, as that Act has been repeatedly construed by this Court.

Section 2, Chapter 137 of the Act of March 3, 1875 as amended by the Acts of 1887 and 1888 authorizing the removal of causes to the circuit courts of the United States provides as follows:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between *citizens of different States,* and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

If Lenhart is properly a co-defendant the Circuit Court of the United States has no jurisdiction because of the fact that at least one plaintiff and one defendant are citizens of the same State. (*Smith* v. *Lyon,* 133 *U. S.* 315; *Removal Cases,* 100 *U. S.* 457). If we eliminate Lenhart as a co-defendant there is no longer a controversy between "citizens of different States," but the controversy is between citizens of Pennsylvania and an alien defendant. Under these circumstances an alien defendant is not entitled to remove. (*King* v. *Cornell,* 106 *U. S.,* 395; *Merchants Cotton Press Co.* v. *Insurance Co. of North America,* 151 *U. S.* 368; *Woodrum* v. *Clay,* 33 *Fed.* 897; *Creigh* v. *Equitable Life Assurance Society of the United States,* 88 *Fed.* 1; *Black's Dillon on Removal of Causes, Sec.* 68).

The first clause of Section 2 of the Act of March 3, 1875, was amended in immaterial respects by the Acts of 1887 and 1888, by requiring that parties petitioning for the removal of a case from a State court must be "non-residents of that State." Mr. Justice Jackson who delivered the opinion of the court in *Merchants Cotton Press Co. v. Insurance Co. of North America, supra,* decided in 1894, referring to the case of *King v. Cornell, supra,* said:

> "It is settled by King *v.* Cornell, 106 U. S. 395, that subdivision two of section 639 of the Revised Statutes was repealed by the act of 1875, so that an alien sued with a citizen had no right of removal, and this subdivision two of that section was not restored by the act of March 3, 1887; hence, an alien, in the position of the alien petitioners, in the present case, would have no right to remove the cause on the ground of a separable controversy."

II.

The complaint presents no separable controversy between the plaintiffs and the defendant FitzGerald that is suspectible of complete determination without the joinder of Lenhart as a co-defendant.

In determining the question of its jurisdiction the Court is not bound by the position on the record as plaintiffs or defendants which the pleader has chosen to assign to the various parties to the litigation but it will ascertain what is the matter in dispute and then arrange the parties according to the nature of the controversy, and if upon such a re-arrangement it appears that the cause is one which is removable the Federal court may assume jurisdiction (*Removal Cases,* 100 *U. S.* 457*; Pacific R. R. Co.* v. *Ketchum,* 101 *U. S.* 289; *Harper* v. *Kernochan,* 103 *U. S.* 562).

But the question whether there exists a separable controversy warranting the removal of a cause to the Federal court must be determined by the state of the pleadings at the time of the filing of the petition for removal and not by any subsequent proceedings in the case. (*Wilson* v. *Oswego Township,* 151 *U. S.* 56; *Bellaire* v. *Baltimore and Ohio R. R. Co.,* 148 *U. S.* 117; *Torrence* v. *Shedd,* 144 *U. S.* 527; *Louisville & Nashville R. R.* v. *Ide,* 114 *U. S.* 52; *Barney* v. *Latham,* 103 *U. S.* 205), for it is the failure of the Court to act upon the defendant's petition at the time it is filed and in the light of the facts as they then appear which is assigned as error. (*Graves v. Corbin, 132 U. S. 571.*)

The situation of the parties in this case, in connection with the relief sought by the complaint, does not admit of placing them on different sides of the matter in dispute, so that those on one side will be citizens of different states from those on the other, for there is no separable controversy between the appellant and the plaintiffs that is susceptible of complete determination without the joinder of Lenhart as a co-defendant.

No such re-arrangement of the parties would have been possible inasmuch as the prayers for relief are largely directed against Lenhart. The plaintiffs not only ask for directions by the Court to Lenhart as trustee under the agreement of December 6, 1906, and for an accounting of the trust funds which it is charged he has failed to apply as required by the trust, but for an injunction against his disposing of the partnership property and for his removal as trustee. No arrangement of the parties which would convert Lenhart into a plaintiff could possibly entitle the plaintiffs to receive the relief demanded in the complaint. (*Thayer* v. *Life Insurance Association of America,* 112 *U. S.* 717; *American Bible Society* v. *Price,* 110 *U. S.* 61; *Wilson* v. *Oswego Township,* 151 *U. S.* 56.)

The admissions contained in paragraph 12 of the defendant's answer serve to demonstrate that Lenhart is a proper party defendant. It is admitted in this division of the answer that, together with the other trustees, he has received the sum of $39,990 applicable to the annuity provided for by the agreement. It is further admitted that under the instructions of the defendant FitzGerald he withholds this sum from the plaintiffs. It seems manifest from these admissions alone that Lenhart as trustee acting in defiance of the terms of the trust under the directions of the appellant, could not by any latitude of the rules of pleading be aligned as a plaintiff in the action.

The statement to be found in the appellant's petition for a writ of error that

> "Lenhart was wrongfully and improperly joined in the bill of complaint as a party defendant for the mere purpose of wrongfully ousting the jurisdiction of the Federal courts by the colorable joinder of a resident and a non-resident as parties defendant,"

is unavailing without other proof. No such charge appears in the petition for removal in the Court below, and his belated allegation to that effect is insufficient to establish it. The burden is upon the defendant to prove that fact. (*Kansas City Suburban Belt R. R. Co.* v. *Herman*, 187 *U. S.* 63). As we have already sufficiently pointed out, the appellant's allegations as to the facts disclosed at the trial are immaterial, and most of them are shown by the record to be unfounded. Lenhart's answer was not disregarded. It was put in issue by the plaintiff's replication and the decree expressly directs him as trustee to perform certain duties. Nor was the complaint dismissed as to him except in his capacity as partner and manager of the Fayette Coke Company and the Shamrock Supply Company.

Considering the nature of the suit and the relief sought thereby, Lenhart cannot be treated as a purely formal and unnecessary party. The character of the relief sought—a lien upon the property the income of which he holds as trustee—makes him not only a necessary but an indispensable party.

III.

The defendant FitzGerald was not entitled to remove the cause to the Circuit Court of the United States, the infant plaintiffs being aliens.

The infant plaintiffs, chiefly for whose benefit the trust fund of $300,000 is to be accumulated, are citizens and residents of Great Britain. Their Guardian *ad litem,* William McClelland, is a citizen and resident of the State of Pennsylvania. The infants are, of course, the real parties in interest. Their Guardian *ad litem* is only a formal party whose citizenship is not material to the jurisdiction of the Federal court. In ascertaining the actual parties to the controversy the Court must consider the substance and not the mere form.

It has sometimes been thought that the same rule which governs the case of an executor should be applied to the case of a guardian; (*In re Estate of McClean,* 26 *Fed.* 49), but the true distinction was pointed out by this Court in *Lamar v. Micou,* 112 *U. S.* 452, where it was said:

> "The case of such a guardian differs from that of an executor of, or trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it."

To the same effect is the exhaustive opinion of McPherson, J. in *Wilcoxen v. Chicago, B. & Q. R. Co.,* 116 *Fed.* 444, where the earlier authorities are carefully collated.

See also *Woolridge v. McKenna,* 8 Fed. 650, and *Dodd v. Ghiselin,* 27 *Fed.* 405, where the same conclusion was reached in an opinion by Mr. Justice Brewer.

In *Buckman v. Palisade Land Company,* 1 *Fed.* 367, this rule was applied to the case of a bill filed on behalf of a *feme covert* by her next friend, the court holding that the citizenship of the real party in interest controlled.

IV.

It appearing that the only Federal question which is sought to be reviewed has been explicitly foreclosed by prior decisions, consequently no basis for the writ of error is afforded thereby. Hence a dismissal is warranted.

A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of State courts.

> *Hamblin v. Western Land Co., 147 U. S. 531.*
>
> *Rogers Locomotive Works v. American Emigrant Co., 164 U. S. 559.*
>
> *Michigan Land Co. v. Rust, 168 U. S. 589.*
>
> *Equitable Life Assurance Society v. Brown, 187 U. S. 308.*
>
> *Iowa v. Rood, 187 U. S. 87.*
>
> *Leonard v. Vicksburg &c. Ry. Co., 198 U. S. 422.*

A writ of error from this court to a State court will be dismissed where the Federal question relied upon to confer such jurisdiction manifestly lacks all color of merit.

Wabash v. Flannigan, 192 U. S. 29.
Wilson v. North Carolina, 169 U. S. 586.
Patterson v. Colorado, 205 U. S. 454.

See also

Griffith v. Connecticut, 218 U. S. 564.

Conclusion.

It is submitted that in view of the simple nature of the only question presented by this writ of error and the obvious answer which that question must receive under controlling decisions of this Court, the motion to dismiss or to affirm should be granted and the judgment of the Supreme Court of Pennsylvania should accordingly be affirmed.

SAMUEL UNTERMYER,
WILLIAM J. STURGIS,
IRWIN UNTERMYER,
Counsel for Appellees.

Supreme Court of the United States,

October Term, 1911.

No. 849.

Office Supreme Court, U
FILED.
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JAMES H. McKENN

Gerald Purcell FitzGerald, invidually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell FitzGerald and Charles E. Lenhart, partners of Fayette Coke Company and Shamrock Supply Company, Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants below,

vs.

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, infants, by William McClelland, their Guardian *ad Litem,*

Plaintiffs below and Appellees.

Notice of Motion to Dismiss or Affirm.

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To

Messrs. Michael J. Ryan,
and James Gay Gordon,
Counsel for Appellant;

4 Please take notice that on Monday, the 18th day of December, 1911, at the opening of the Court, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

Yours, &c.,
Samuel Untermyer,
William J. Sturgis,
Counsel for the Appellees for
5 the purposes of these motions.

6

Supreme Court of the United States, 7

OCTOBER TERM, 1911.

No. 849.

GERALD PURCELL FITZGERALD, invidually and as Trustee; Charles E. Lenhart, as Trustee; Gerald Purcell FitzGerald and Charles E. Lenhart, partners of Fayette Coke Company and Shamrock Supply Company, Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, 8

Defendants below,

vs.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald, infants, by William McClelland, their Guardian *ad Litem*, 9

Plaintiffs below and Appellees.

Motion to Dismiss or Affirm.

Now come the Appellees, by their counsel appearing in that behalf, and move to dismiss the

10 appeal in the above entitled cause for want of
jurisdiction, because the record presents no Federal
question since the question sought to be reviewed
by the writ of error herein has been so conclusively
foreclosed by prior decisions of this
court as to be frivolous and therefore inadequate
to confer jurisdiction.

And the said Appellees, by counsel as aforesaid,
also move the Court to affirm the said judgment
or decree from which said appeal or writ
of error purports to have been taken, because,
although the record in the said cause may show
that this Court has jurisdiction in the premises,
11 yet it is manifest that said appeal or writ of
error was taken for delay only and upon the
further ground that the question on which the
jurisdiction depends is so frivolous as not to require
further argument.

Samuel Untermyer,
William J. Sturgis,
Counsel for the Appellees for
the purposes of these motions.

12

FILED.

DEC 16 1911

JAMES H. McKENNEY,

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 849. October Term, 1911.

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald; Lida Eleanor Purcell FitzGerald; John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, infants, by William McClelland, their Guardian ad litem,

Plaintiffs below and Appellees,

vs.

Gerald Purcell FitzGerald,

Defendant below and Appellant.

Appeal by Defendant, Gerald Purcell FitzGerald.

Appellant's Brief contra Motion to Dismiss or Affirm.

William A. Stone,
Michael J. Ryan,
James Gay Gordon,
Counsel for Appellant.

Lawyers' Book Ptg. Co., 804 Walnut St., Phila.

IN THE

Supreme Court of the United States

December Term, 1911. No. 849.

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald; LIDA ELEANOR PURCELL FITZGERALD; JOHN PURCELL FITZGERALD, EDWARD MAURICE FITZGERALD and GERALD PURCELL FITZGERALD, infants, by WILLIAM McCLELLAND, their Guardian *ad litem*,
Plaintiffs below and Appellees,

vs.

GERALD PURCELL FITZGERALD,
Defendant below and Appellant.

APPELLANT'S BRIEF CONTRA MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

On October 27th, 1910, proceedings, by Bill in Equity, were instituted in the Court of Common Pleas of Fayette County, in the State of Pennsylvania, wherein Josiah V. Thompson, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald; Lida Eleanor Purcell FitzGerald; John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, infants, by William McClelland, their Guardian *ad litem*, were named as parties Plaintiff, and Gerald Purcell FitzGerald, individually and as Trustee of the Trusts therein described; Charles E. Lenhart, as Trustee of the Trusts therein described; Gerald Purcell FitzGerald and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, were named as parties defendant. The purpose of the Bill was to enforce the provisions of a contract made by the appellant, Gerald Purcell FitzGerald, to pay to his wife, Lida Eleanor Purcell FitzGerald, through Trustees, certain annual sums, and to provide a fund the income from which was to be paid in part to her and in part for the maintenance of their minor children, Gerald Purcell FitzGerald, the defendant in the Bill, filed a petition to remove the proceedings to the United States Circuit Court for the Western District, on the ground that he was an alien non-resident in the State of Pennsylvania, and a citizen and subject of the United Kingdom of Great Britain and Ireland. The Court of Common Pleas of Fayette County refused the prayer of the petition and directed the parties to proceed. Gerald Purcell FitzGerald then appeared by counsel and filed his separate answer to the bill, to which a replication was filed and issue joined, and upon which a hearing was afterwards had and a decree entered in favor of the plaintiffs and against the defendant, Gerald Purcell FitzGerald, only. From this action of the Court an appeal was taken to the Supreme Court of Pennsylvania, the Court of last resort in the State of Pennsylvania, in which appeal it was, *inter alia*, assigned as error, as follows:

"ELEVENTH: The learned Court erred in refusing upon the petition of the defendant, Gerald Purcell FitzGerald, to proceed no further in the said suit, and to transfer the said suit to the Circuit Court of the United States for the Western District of Pennsylvania."

After argument upon the appeal, in the Supreme Court of Pennsylvania, that Court dismissed the appeal, and as to the assignment of error above quoted, said:

"As this is not a controversy wholly between citizens of different States, the petition of the appellant for a transfer of the proceedings to the Circuit Court of the United States for the Western District could not have been allowed."

From this action of the Court of Common Pleas of Fayette County, affirmed by the Supreme Court of the State of Pennsylvania, the present appeal has been taken.

The petition for removal (duly supported by a good and sufficient bond which was accepted and approved by the Court) was as follows:

PETITION FOR REMOVAL.

"IN THE
COURT OF COMMON PLEAS OF FAYETTE COUNTY,
STATE OF PENNSYLVANIA.

No. 618. Sitting in Equity.

Between

Josiah V. Thompson, as Trustee for Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, of the trusts within described; Lida Eleanor Purcell FitzGerald; John Purcell FitzGerald, Edward Maurice Fitzgerald and Gerald Purcell FitzGerald, infants, by William McClelland, their guardian ad litem,

Plaintiffs,

and

Gerald Purcell FitzGerald, individually and as Trustee for the trusts within described; Charles E. Lenhart, as Trustee of the trusts within described; Gerald Purcell FitzGerald and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, manager of Fayette Coke Company and Shamrock Supply Company,

Defendants.

To the Honorable the Judges of the said Court:

The petition of the said Gerald Purcell FitzGerald, one of the defendants above named, respectfully represents:

That a Bill in Equity entitled as above set forth has been filed in your Honorable Court by the plaintiffs above named against your petitioner, one of the defendants above named, to No. 618, of which action the Circuit Court of the United States in and for the Western District of Pennsylvania has concurrent jurisdiction with your Honorable Court.

That the said plaintiff, Josiah V. Thompson, is a citizen of the State of Pennsylvania, and a resident of the Western District thereof, and was such at the time of the filing of the said Bill.

That the plaintiff, Lida Eleanor Purcell FitzGerald, is averred in said Bill to be a resident of the State of Pennsylvania, having her domicil in the said Western District thereof.

That the plaintiff, William McClelland, appointed by your Honorable Court as guardian *ad litem* of the minor children named in the said Bill, is a citizen of the State of Pennsylvania, and a resident in the Western District thereof and was such at the time of bringing this action.

That the said defendant, your petitioner, at the time this suit was commenced, was, and still is, as averred in said Bill, a resident of the Island Waterford, Ireland, and is a subject of the King of the United Kingdom of Great Britain and Ireland, and is not now and was not at the time of filing the said Bill a resident of the State of Pennsylvania.

That the defendants, Charles E. Lenhart, Trustee named in the said action, and Charles E. Lenhart, partner named therein, and Charles E. Lenhart, manager of Fayette Coke Company and Shamrock Supply Company, named therein, are not active, necessary, indispensable, or substantially interested parties thereto. That this defendant, your petitioner, is the only active, necessary, indispensable, substantially interested party thereto. That this defendant, your petitioner, is the only active, necessary, indispensable, substantially interested and principal defendant. That the matter in dispute as shown by said Bill is between the said Josiah V. Thompson, Trustee as aforesaid, the said Lida Eleanor Purcell FitzGerald and Charles E. Lenhart, Trustee as aforesaid, on the one side of said controversy, and the said Gerald Purcell FitzGerald individually on the other. That the real and actual controversy is the right of the said aforementioned persons to collect from your petitioner, the said Gerald Purcell FitzGerald, for the benefit of certain *cestuis que trustent*, certain sums of money in accordance with a certain agreement set forth at length in said Bill (which agreement the said Gerald Purcell FitzGerald alleges to be wholly void) which right to collect said sums of money is affirmed by said Josiah V. Thompson and said Lida Eleanor Purcell FitzGerald and denied by said Gerald Purcell FitzGerald, in which denial said Charles E. Lenhart is only interested as co-trustee of said Josiah V. Thompson, and such interest, if any, is of like character with that of the said Josiah V. Thompson and contrary to the interests of said Gerald Purcell FitzGerald.

That said action is for a matter in dispute exceeding the sum of Two Thousand Dollars, exclusive of interest and costs.

That said defendant, your petitioner, desires to remove said Bill in Equity, suit, or action from your Honorable Court to the Circuit Court of the United States in and for the Western District of Pennsylvania, at Pittsburg, and that the time limited for such removal has not expired.

That the said defendant, your petitioner, has executed and presents herewith for filing, a bond with good and sufficient surety that he the said defendant will enter in said Circuit Court on the first day of its next session a copy of the record of such suit and for paying all costs that may be awarded by said Circuit Court, if such Court shall hold that such suit was wrongfully or improperly removed thereto and also that said defendant will appeal and enter special bail in said suit, if special bail was requisite therein.

Wherefore, your petitioner prays that this Honorable Court will accept this petition and bond, and proceed no further in said suit and that an order may be made by it transferring the said suit to the said Circuit Court of the United States for the Western District of Pennsylvania.

GERALD PURCELL FITZGERALD.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF PENNSYLVANIA,
CITY OF UNIONTOWN,
COUNTY OF FAYETTE. } *ss.*

Gerald Purcell FitzGerald, being duly sworn according to law, deposes and says that he is the principal defendant and under the proper arrangement of the parties the sole defendant named in the above entitled cause and the petitioner in the foregoing petition; that he has read the same and knows the contents thereof and that the statements therein set forth are true.

GERALD PURCELL FITZGERALD.

Sworn to and subscribed before
me this 28th day of November, A.
D. 1910.

CHARLES T. CRAMER,
(SEAL) *Notary Public.*
My commission expires Jan. 19, 1911."

The present appeal to the Supreme Court of the United States was allowed by His Honor, Mr. Justice Lurton, upon the presentation of the following petition supported by a good and sufficient bond:

PETITION FOR WRIT OF ERROR.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

The petition of Gerald Purcell FitzGerald

RESPECTFULLY SHOWETH:

That on October 27, 1910, the plaintiffs did file in the Court of Common Pleas of Fayette County in the State of Pennsylvania, their Bill of Complaint and a Citation was issued upon the defendant, your petitioner, to show cause why the prayers therein set forth should not be granted—the service being made upon Charles E. Lenhart, hereinafter mentioned, the said Lenhart being alleged to be your petitioner's attorney in fact.

That the defendant, your petitioner, did thereupon petition for the removal of the cause to the United States Circuit Court for the Western District of Pennsylvania, because of the diverse citizenship of the parties—the defendant, Gerald Purcell FitzGerald, being before the time of the filing of the said Bill, at the said time and since, a resident of Ireland and a subject of the King of Great Britain and Ireland and having at no time been a citizen of the United States or a resident of the State of Pennsylvania, while all the other parties to the action were and are citizens of the United States and residents of the State of Pennsylvania. As shown by the defendant's petition for removal, Charles E. Lenhart, who was originally joined in the Bill as co-defendant, is not an active, necessary or substantially interested party to the suit and your petitioner avers that said Lenhart was wrongfully and improperly joined in the Bill of Complaint as a party defendant for the mere purpose of wrongfully ousting the jurisdiction of the Federal Courts by the colorable joinder of a resident and a non-resident as parties defendant, although said Lenhart had no active or substantial interest as a defendant. Your petitioner suggests to the Court that this is shown by the fact that the separate Demurrer and Separate Answer filed by said Lenhart were disregarded and the case went to trial in the Fayette County Court in spite of the said Demurrer filed by Lenhart and with the same undisposed of and with his said Answer not considered, alluded to or disposed of, and with him taking no part in the trial except as a witness for the plaintiffs, and that the Bill was thereafter dismissed entirely as to said Lenhart as partner and manager, and he thereupon dropped out of the case except as trustee, in which capacity his interests are opposed to the defendant, your petitioner, and his name no longer appears as a party on either side, except in his adverse position as a trustee, interested in sustaining the trust, and no decree of any kind was entered against him, but on the contrary the decree was directed solely and exclusively against your petitioner.

Your petitioner avers that the matter in dispute is between Josiah V. Thompson, as Trustee, and Lida Eleanor Purcell FitzGerald on the one side, and Gerald Purcell FitzGerald, individually, on the other side, and that the real and actual controversy is over the validity of the trust agreement set forth at length in the Bill of Complaint and over the right of the trustees to collect from the defendant (or from certain of his properties) certain sums of money for the benefit of the *cestui que trustents*, all of whom are made plaintiffs in the suit. In this controversy, the plaintiffs uphold the validity of the agreement and the right to collect the money while the defendant, Gerald Purcell FitzGerald, denies their right and alleges the trust agreement to be wholly void. The said Lenhart, therefore, has absolutely no interest as a defendant, and if interested at all in the case, it is only as a co-trustee of said Josiah V. Thompson, in upholding the agreement, which interest, if any, is of like character with that of said Thompson and contrary to the interests of said FitzGerald, the defendant. The real and actual controversy is and was, therefore, between citizens of the United States and residents of Pennsylvania on the one side, and a citizen and resident of Great Britain and Ireland on the other side.

The defendant, in his petition, therefore prayed the Court below that the said Bill in Equity, suit or action, might be removed from the Court of Common Pleas of Fayette County, Pennsylvania, to the Circuit Court of the United States in and for the Western District of Pennsylvania, at Pittsburg, and did then and there file the necessary bond; but the said Court of Common Pleas, on November 30, 1910, did erroneously refuse to make an order transferring the suit to the Circuit Court of the United States for the Western District of Pennsylvania, to which action of the Court the said defendant excepted and a Bill of Exceptions was then there duly sealed on the thirtieth day of November, 1910, which exception was, to wit, on April 1, 1911, after argument, overruled and dismissed.

And thereafter, to wit, on April 1, 1911, the said defendant Gerald Purcell FitzGerald, did except to the order overruling and dismissing his exception and at his instance a Bill of Exceptions was sealed. Thereupon, the said defendant did appeal to the Supreme Court of Pennsylvania, which, on April 5, 1911, issued its *certiorari* to bring up the record from the said Court of Common Pleas of Fayette County; and on the same day, the said defendant duly filed his assignments of error.

That upon the argument of the said appeal to the Supreme Court of the State of Pennsylvania, the said Supreme Court dismissed the exception filed by your petitioners and affirmed the judgment of the Court of Common Pleas of Fayette County, State of Pennsylvania, the Court holding that:

> "As this is not a controversy wholly between citizens of different States, the petition of the Appellant for a transfer of the proceedings to the Circuit Court of the United States for the Western District could not have been allowed."

That the judgment of the said Supreme Court of the State of Pennsylvania is the judgment of the highest court of record of said State and that the judgment of the said Court is final. That the decision and judgment of the Supreme Court of Pennsylvania is erroneous, *inter alia,* in that it overruled the defendant's eleventh Assignment of Error, which was:

> "The learned Court erred in refusing, upon the petition of the defendant, Gerald Purcell Fitz-Gerald, to proceed no further in said suit and to transfer the said suit to the Circuit Court of the United States for the Western District of Pennsylvania."

and in deciding that the Courts of the United States had not jurisdiction.

Your petitioner therefore prays for the allowance of a Writ of Error to the Supreme Court of Pennsylvania, in order that the judgment of the said Court may be so examined and reversed or affirmed in the Supreme Court of the United States.

And he will ever pray.

(Signed) Gerald Purcell FitzGerald,
By his attorneys,
James Gay Gordon,
Michael J. Ryan."

The questions for review in the present appeal are raised by the following Assignments of Error, which were duly filed of record in the case:

ASSIGNMENTS OF ERROR.

Now comes the above named defendant and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Pennsylvania erred in holding and deciding that the petition of Gerald Purcell FitzGerald, the Appellant, (he being a citizen and subject of the United Kingdom of Great Britain and Ireland), filed with a proper bond in the Court of Common Pleas of Fayette County, State of Pennsylvania, for a transfer of the proceedings from the said Court to the Circuit Court of the United States for the Western District of Pennsylvania, could not be allowed and was properly and lawfully refused by the said Court of Common Pleas of Fayette County; and in affirming the action and judgment of the said Court of Common Pleas of Fayette County in refusing the said petition for a transfer of the proceedings from the said Court of Common Pleas of Fayette County, Pennsylvania, to the Circuit Court for the Western District of Pennsylvania.

For which errors the said defendant, Gerald Purcell FitzGerald, prays that the said judgment of the Supreme Court of the State of Pennsylvania, dated July 6th, 1911, be reversed and a judgment rendered in favor of the defendant and for costs.

William A. Stone,
James Gay Gordon,
Michael J. Ryan,
Attorneys for Gerald Purcell FitzGerald.

In the petition for removal, the jurisdiction of the Circuit Court of the United States is asserted upon the sole ground that in the proceeding in equity instituted in the Court of Common Pleas of Fayette County, Pennsylvania, wherein "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars", the controversy is really and in fact wholly between parties plaintiff who are resident citizens of the State of Pennsylvania, and a single defendant, Gerald Purcell FitzGerald, a resident of the Island Waterford, Ireland, and a subject of the King of the United Kingdom of Great Britain and Ireland, and who was not at the time of the filing of the Bill in Equity a resident of the State of Pennsylvania.

While it is true, that in bringing the action, the plaintiffs have joined Charles E. Lenhart, a citizen of Pennsylvania, with the alien non-resident defendant, Gerald Purcell FitzGerald, yet, as to him, the petition for removal expressly avers:

> "That the defendants, Charles E. Lenhart, Trustee named in the said action, and Charles E. Lenhart, partner therein, and Charles E. Lenhart, manager of Fayette Coke Company and

Shamrock Supply Company, named therein, are not active, necessary, indispensable, or substantially interested parties thereto. That this defendant, your petitioner, is the only active, necessary, indispensable, substantially interested and principal defendant. That the matter in dispute as shown by the Bill is between the said Josiah V. Thompson, Trustee as aforesaid, the said Lida Eleanor Purcell FitzGerald and Charles E. Lenhart, Trustee as aforesaid, on the one side of the controversy, and the said Gerald Purcell FitzGerald, individually, on the other. That the real and actual controversy is the right of the said aforementioned persons to collect from your petitioner, the said Gerald Purcell FitzGerald, for the benefit of certain *cestui qui trustent*, certain sums of money in accordance with a certain agreement set forth at length in said Bill (which agreement the said Gerald Purcell FitzGerald alleges to be wholly void) which right to collect said sums of money is affirmed by said Josiah V. Thompson and the said Lida Eleanor Purcell FitzGerald and denied by said Gerald Purcell FitzGerald, in which denial said Charles E. Lenhart is only interested as co-trustee of said Josiah V. Thompson, and such interest, if any, is of like character with that of the said Josiah V. Thompson and contrary to the interests of said Gerald Purcell FitzGerald."

POINTS.

I.

IF, IN THIS CASE, THE PETITION FOR REMOVAL ON ITS FACE, PRESENTED JURISDICTIONAL FACTS, SUFFICIENT TO ENTITLE THE PETITIONER TO A REMOVAL, THE STATE COURT WAS WITHOUT AUTHORITY TO DENY THE REMOVAL OR TO PROCEED FURTHER IN THE CASE.

The State Court, moreover, was without competence to inquire into the truth of the facts or to try any disputed questions of fact raised by an answer to the petition. That power is exclusively vested in the United States Circuit Court. This was expressly and unqualifiedly decided in the case of

> BURLINGTON, CEDAR RAPIDS & NORTHERN RAILROAD COMPANY, vs. CHARLES L. DUNN, 122 U. S. 513; (30 Law Ed. 1159),

wherein Mr. Chief Justice Waite, delivering the opinion of the Court, says as follows:

* * * * * * *

> The assignment of errors presents but a single question, and that is whether, as after the petition for removal had been filed the record showed on its face that the State Court ought to proceed no further, it was competent for that court to allow an issue of fact to be made upon the statements in the petition, and to retain the suit because on that issue the Railway Company had not shown by testimony that the plaintiff was actually a citizen of Minnesota.
>
> It must be confessed that previous to the cases of Stone vs. South Carolina, 117 U. S. 432 (29 Law Ed. 962), and Carson vs. Hyatt, 118 U. S. 279 (ante 167) decided at the last term, the utterances of this court, on that question, had not always been as clear and distinct as they might have been. Thus, in Gordon vs. Longest, 41 U. S. 16 Pet. 97 (10:900) in speaking of removals under section 12 of the Judiciary Act of 1789, it was said p. 104 (902), 'it must be made to appear to the satisfaction of the State Court that the defendant is an alien, or a citizen of some other State than that in which the suit was brought'; and in Railway Co. vs. Ramsey, 89 U. S. 22 Wall. 328 (22:824) that, 'if upon the hearing of the petition it is sustained by the proof, the State Court can proceed no further.' In other cases expressions

of a similar character are found, which seem to imply that the State Courts were at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal. •At the last term it was found that this question had become a practical one, about which there was a difference of opinion in the State Courts, and to some extent in the Circuit Courts; and so, in deciding Stone vs. South Carolina, we took occasion to say, 'All issues of fact made upon the petition for removal must be tried in the Circuit Court; but the State Court is at liberty to determine for itself whether, on the face of the record, a removal has been effected.' It is true, as was remarked by the Supreme Judicial Court of Massachusetts in Amy vs. Manning, 144 Mass. 153, that this was not necessary to the decision in that case; but it was said on full consideration, and with the view of announcing the opinion of the Court on that subject. Only two weeks after that case was decided Carson vs. Hyatt came up for determination, in which the precise question was directly presented, as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in Stone vs. South Carolina, and decided that it was error in the State Court to proceed further with the suit after the petition for removal was filed, because the Circuit Court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in Carson vs. Dunham, 121 U. S. 421 (ante 992), and is in entire harmony with all that had been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds it is the true rule and calculated to produce less inconvenience than any other.

The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the State Court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the State Court has the right to decide for itself; and if it errs in keeping the case, and the highest Court of the State affirms its decision, this Court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. Stone vs. South Carolina, 117 U. S. 432 (*supra*) and cases there cited."

See also:

Kansas City Co. et al. vs. Daughtry, 138 U. S. 298 (34 Law Ed. 963);
Stone vs. South Carolina, 117 U. S. 430, (29 Law Ed. 962);
Sinclair vs. Pierce, 50 Fed. Rep. 851.

While it is true, that the right to removal must be determined by the condition of the record at the time the petition was filed, and not by subsequent proceedings:

Merchant's Cotton Press & S. Co. vs. Insurance Company of North America, 151 U. S. 368 (38 Law Ed. 195);
Graves v. Corbin, 132 U. S. 571 (33 Law Ed. 467);
Mayer vs. The Delaware R. R. Const. Co., 100 U. S. 457, (25 Law Ed. 593);

yet, as a matter of fact, in this case all of the subsequent proceedings strongly corroborate and confirm the allegations of the Appellant's petition for removal, that the controversy was wholly between the plaintiffs, citizens of the State of Pennsylvania, on the one side, and Gerald Purcell FitzGerald, individually, on the other.

The defendant Lenhart, filed a separate demurrer to the plaintiff's bill of which the following is a copy:

SEPARATE DEMURRER OF CHARLES E. LENHART.

Charles E. Lenhart, for himself as one of the partners as Fayette Coke Company and Shamrock Supply Company; and Charles E. Lenhart, Manager of said Fayette Coke Company and Shamrock Supply Company, co-partnerships, defendant, demurs to the whole Bill filed by plaintiffs in this case and for cause of demurrer shows:

I.

That upon the face of the Bill the plaintiffs are not entitled to any relief as against the defendant Lenhart either as one of the partners of said co-partnerships, the Fayette Coke Company and the Shamrock Supply Company, or as manager of said co-partnerships.

II.

It nowhere appears in the Bill that the said defendant Lenhart as partner has any duty or obligation to perform towards the plaintiffs or any of them, or that the plaintiffs have any right of any kind against the said defendant as partner of the defendant FitzGerald.

III.

It nowhere appears by the Bill that the plaintiffs have any right of any kind against the defendant Lenhart as Manager of the Fayette Coke Company or of the Shamrock Supply Company, or that the said defendant as Manager, as aforesaid, is under any obligation to the plaintiffs or any of them.

IV.

It nowhere appears in the Bill that the defendant Lenhart as partner or manager, as aforesaid, had or has the custody, control or distribution of any of the profits of said co-partnerships belonging to the defendant FitzGerald.

V.

The defendant Lenhart as partner or manager is not a party to the agreement set forth in the Bill and upon which the right of action of the plaintiffs, if any, is founded.

VI.

It nowhere appears in the Bill that the defendant Lenhart is under any obligation to continue, or that he will continue for any certain period, the partner of the defendant FitzGerald or Manager of said co-partnerships, and no effective decree can be entered against him in either of said capacities.

VII.

It nowhere appears in the Bill that there is any obligation on the defendant Lenhart either as partner or manager to account to any one but his co-partner FitzGerald; and the Bill contains no allegation whatever that he has ever refused or neglected, or that there are any grounds upon which to found a belief that he will hereafter refuse or neglect to properly account as partner and manager to said defendant FitzGerald, or his duly authorized agent or representative, for the nine-tenths of the profits of said Fayette Coke Company and Shamrock Supply Company.

VIII.

There is nothing in the Bill to entitle the plaintiffs, or any of them, to have a lien declared against the one-tenth interest of the defendant Lenhart in said co-partnership properties.

IX.

There is nothing in the Bill to entitle the plaintiffs, or any of them, to have the defendant Lenhart as partner or otherwise restrained from alienating or encumbering his one-ninth interest in said co-partnership properties.

JOHNSON & RUSH,
Solicitors for Charles E. Lenhart,
Defendant as aforesaid.

The State Court permitted the plaintiffs to proceed to trial pending this demurrer and before it was heard or disposed of.

In the trial, the only appearance of Lenhart was as a witness for the plaintiffs.

At the conclusion of the hearing, the following motion was made and allowed:

> "Mr. Untermyer: Plaintiffs' counsel admit that no proof has been made sufficient to charge the defendant Lenhart in his capacity either as partner or as Manager of the Fayette Coke Company or the Shamrock Supply Company, nor do they ask for his removal as Trustee upon the proof now before the Court, although the plaintiffs claim that a sufficient case has been made against the defendant Lenhart to hold him in the action in his capacity as Trustee."
>
> "By the Court: In view of the statement of plaintiffs' counsel regarding the defendant Lenhart, the Court dismisses the action against the said Lenhart as partner and manager but not as Trustee."

The reservation seeking to hold Lenhart as a party defendant, "in his capacity as Trustee", was obviously an attempt to defeat Appellant's right to remove the cause into the United States Circuit Court. There was no relief of any kind sought, as against him, and the only decree entered in the case was against the Appellant, Gerald Purcell FitzGerald, solely and individually. Following is a copy of the decree:

DECREE OF THE COURT BELOW.

Now, March 3d, 1911, this cause came on to be heard at this term and was argued by counsel; and now, March 15th, 1911, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

I.

That the defendant, Gerald Purcell FitzGerald forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell FitzGerald, the sum of sixteen thousand four hundred and sixty dollars ($16,460.00), and that the said Trustees pay the same to Lida Eleanor Purcell FitzGerald.

II.

That the defendant, Gerald Purcell FitzGerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell Fitzgerald, John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, minor children of the said defendant, Gerald Purcell FitzGerald, and of the said Lida Eleanor Purcell FitzGerald, the sum of Five thousand three hundred and eighty-eight dollars ($5,388.00), upon the trusts set forth in Paragraph Third of the agreement dated December 6, 1906, and set forth at large in the Bill filed herein.

III.

That the payments provided for in said agreement of December 6, 1906, be and the same are hereby adjudged to be a lien on all the right, title and interest of the defendant, Gerald Purcell FitzGerald, in and to the real property described in Paragraph Ninth of the Bill filed herein and known as the Fayette Coke Company property.

IV.

That the defendant, Gerald Purcell FitzGerald, be and he is hereby removed from his office as Trustee of the trusts created by said agreement of December 6, 1906, and he is hereby directed to account for and pay over to Josiah V. Thompson and Charles E. Lenhart, Trustees of the trusts created by said agreement of December 6, 1906, and to the Trustee to be hereafter chosen by them, the said Thompson and Lenhart, or appointed by the Court, in place of the said Gerald Purcell FitzGerald, all sums in his hand or for which he is accountable under said agreement of December 6, 1906.

V.

That Richard W. Dawson, Esq., be and he is hereby appointed Referee to take and state the account of the said defendant Gerald Purcell FitzGerald as Trustee as aforesaid and report the same to the Court, and upon final confirmation of said report that judgment be entered against the said Gerald Purcell FitzGerald for the amount found due on such accounting.

VI.

That Josiah V. Thompson and Charles E. Lenhart, Trustees as aforesaid, are hereby directed to appoint some competent and judicious person as Trustee in place of the said Gerald Purcell FitzGerald, within ten days; in case they are unable to agree they shall report their disagreement to the Court forthwith at the expiration of said period of ten days.

VII.

That the defendant, Gerald Purcell FitzGerald, be and he is hereby restrained and enjoined from in any wise alienating, encumbering or otherwise disposing of his interest in the property of the Fayette Coke Company and in the property of the Shamrock Supply Company, unless and until there shall have been accumulated in the hands of the Trustees under the said agreement of December 6, 1906, the sum of Three Hundred Thousand Dollars, as provided by Paragrpah Third of said agreement.

VIII.

That the defendant, Gerald Purcell FitzGerald, pay the costs of this proceeding.

BY THE COURT.

Attest:

William McClelland,
Prothy.

II.

WHERE, BY A RE-ALIGNMENT OF THE PARTIES TO A SUIT ACCORDING TO THEIR INTERESTS, IT APPEARS THAT ALL THE PLAINTIFFS ARE CITIZENS OF ONE STATE AND THE SOLE DEFENDANT IS A NON-RESIDENT ALIEN, HAS SUCH DEFENDANT A RIGHT TO HAVE THE CAUSE REMOVED TO THE UNITED STATES CIRCUIT COURT OF THE PROPER DISTRICT?

This was the one question presented by the petition for removal and the one question now before the Court. If it must be answered in the affirmative, then, under the facts set forth in the petition for removal, the State Court should have relinquished its jurisdiction over the cause for, in the language of the Act of Congress, its duty was "to proceed no further in such suit."

The right of a non-resident alien defendant, in such circumstances, to remove a cause from the State to the Federal Courts, is expressly given by Act of Congress. Ever since the original Judiciary Act of 1789, (1st St. L. 73), that right has been secure:

> "Sec. 12. And be it further enacted, That if a suit be commenced in any State Court against AN ALIEN, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the afore-

> said sum or value of Five Hundred Dollars, exclusive of costs, to be made to appear to the satisfaction of the Court; and the defendant shall, at the time of entering his appearance in such court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the District where the suit is pending, or if in the District of Maine, to the District Court next to be holden therein, or if in Kentucky District to the District Court next to be holden therein, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause", etc.

This statute was enacted by the first Congress of the United States. Subsequently, Congress passed an act on July 27th, 1866, which was amended on March 2nd, 1867, providing for the removal of certain suits therein described by either the plaintiff or the defendant upon an affidavit alleging local prejudice.

The main provisions of the Act of 1789, Section 12; the main provisions of the Act of 1867, were later codified as Revised Statutes, Section 639, Clauses 1, 2 and 3:

> "Sec. 639. Any suit commenced in any State Court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed, for trial, into the Circuit Court, for the District where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section."
>
> "First. When the suit is against AN ALIEN, or is by a citizen of the State wherein it is brought, and against a citizen of another State,

> it may be removed on the petition of such defendant, filed in said State Court at the time of entering his appearance in said State Court.
>
> "Second. When the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same and a citizen of another State, it may be so removed, as against said alien or citizen of another State, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the State Court, as against the other defendants", etc.

Congress again, on March 3rd, 1875, passed an Act extending the right of removal by section 2, thereof, 18 St. L. 470, giving to "either party" the right to remove where the controversy was "between citizens of a State and foreign States, citizens, or subjects."

On March 3rd, 1887, Section 2 of the Act of 1785, was amended restricting the jurisdiction of the Circuit Court. There were many formal errors in the enrollment of this Act and on August 13, 1888, an Act was passed which is generally referred to as the Act of 1887-8, to correct these formal errors. This is the Act now in force upon the subject: (25 Stat. L. 434.)

Section one of the Act of 1887-8, provides:

> "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two thousand dol-

> lars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and FOREIGN STATES, CITIZENS OR SUBJECTS, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid", etc.

Section 2 of the same Act, which provides for the removal of causes is made dependent upon the foregoing section 1. It provides:

> "That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any State Court may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district", etc.

By a reading of Sections 1 and 2, of the Act of 1887-8 (*Supra*), it will be found that the right of removal from State to Federal Courts may be grouped under four general heads:

I. Cases involving Federal questions.
II. Diverse citizenship and *alienage*.
III. Separable controversies, between citizens of different states.
IV. Prejudice or local influence.

It is under the second of these general headings (diverse citizenship and alienage) that the application in the present case was based.

"The test of the right of removal is that the case must be one over which the circuit court might have exercised original jurisdiction under section 1 of the Act of March 3, 1887, (24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 514; 25 Stat. at L. 433, chap. 866)."

Mr. Justice Peckham, in Boston & M. Consol. C. & M. Min. Co. v. Montana Ore Purchasing Co. (1903) 188 U. S. 640 (47 Law Ed. 626).

See also, The Mexican R. R. Co. v. Davidson, 157 U. S. 201, (39 Law Ed. 672).

By this test, if Gerald Purcell FitzGerald, were the sole defendant named in the action, there would be no question of his right of removal, for the suit would be a "suit of civil nature, * * * in equity * * * where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. * * * in which there is * * * a controversy between citizens of a State and foreign States, citizens, or subjects."

In enumerating the suits to which the jurisdiction of the Federal Courts may be extended, the Constitution of the United States, names those "between a State or the citizens thereof, and foreign States, citizens or subjects."

Constitution of U. S., Article 3, Section 2,
Clause 1.

The Judiciary Act of 1789 and the Revised Statutes use the term alien to comprehend a foreign citizen or subject.

See Barrow Steamship Co. vs. Kane, 170
U. S. 100, (42 Law Ed. 964).

The Act of 1887-88 (*supra*) gives the right of removal to the defendant. This is in accordance with the language of the Act and the meaning of the Act was so interpreted in the cases of:

> Hanrick vs. Hanrick, (1894) 153 U. S. 197;
> Caples vs. Texas, etc. R. R. Co. (1895), 67 Fed. Rep. 9;
> Pitkin Co. vs. Minn. Co. vs. Markell (1897), 33 Fed. Rep. 386.

Upon this subject, Moon on the Removal of Causes, Sec. 148, page 427, says:

> "The right of a plaintiff to remove a suit from the State Court, in which it was begun, to a Circuit Court of the United States, was taken away by the Amendatory Act of 1887-8 (with an unimportant exception). The exception is that a plaintiff may remove a suit between citizens of the same State claiming lands under grants of different States. The general right to remove is now given only to a defendant or defendants."

In the case of Gordon v. Longest, 16 Peters, 97, (10 Law Ed. p. 900), the general policy of these Acts is stated by Mr. Justice M'Lean, in the following words:

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated if a State Judge, in the exercise of his discretion, may deny to the party entitled to it a removal of his cause."

In Foster's Federal Practice, Vol. II, page 1513, Sec. 384, he says:

> "A removal because of alienage or because the

> parties to the controversy are citizens of different States, can only be made by parties who are non-residents of the State where the suit is brought."

The petition for removal in the present case clearly sets out that the defendant, Gerald Purcell FitzGerald, is a non-resident of the State of Pennsylvania and a citizen and subject of the King of the United Kingdom of Great Britain and Ireland.

If the suit, then, were one nominally between the plaintiffs therein named, all of whom are citizens of the State of Pennsylvania, and Gerald Purcell FitzGerald, as the sole defendant, there could be no question of his right to removal. The suit is a civil suit in Equity, the amount in controversy is more than $2000, exclusive of interest and costs, as appears from the record, and the defendant, FitzGerald, is a non-resident, alien, being a citizen and subject of the King of Great Britain and Ireland.

The rights of such alien defendant sued in a State Court to remove the suit into the Federal Court is clearly recognized in:

> Evers v. Watson, 156 U. S. 527, (39 Law Ed. 520);
> Merchants' Cotton Press, etc. Co. vs. Ins. Co. of North America, 151 U. S. 368;
> Hinckley vs. Byrne, 12 Fed. Cas. 6,510;
> Hennessy v. Richardson Drug Co., 189 U. S. 25, (47 Law Ed. 697).

And was expressly decided in the case of Purcell v. British Land & Mortgage Co., Limited, 42 Federal Reporter, 465, by Foster, J., of the Circuit Court, D. Kansas, (1890).

It is true, as stated in Moon on the Removal of Causes, Section 130, p. 341, that:

> "When a removal is sought under the clause as to a controversy between citizens and aliens, it has been held that all the parties on one side 'must be citizens of a State' and all the parties on the other side 'foreign States, citizens or subjects'. There can be no removal if there are aliens on both sides of the controversy, or if any alien is joined with a citizen of the same State as a citizen on the other side."

Citing:

Sawyer v. Switzerland Marine Ins. Co., 21 Fed. Cas. 589;
Tracy v. Morel, 88 Fed. Rep. 801;
King v. Cornell, 106 U. S. 395, (27 Law Ed. 60);
Merchants' Cotton Press Co. v. Ins. Co., 151 U. S. 368, (38 Law Ed. 195).

It is true, also, that a suit to be removable from a State to a Federal Court on the ground of a separable controversy must be "wholly between citizens of different States"; and that, no alien can remove a case from the State to a Circuit Court of the United States on the ground that there is embraced therein a separable controversy.

King vs. Cornell (*supra*);
Merchants' Cotton Press Co. v. Ins. Co. (*supra*).

But the petition in this case was not placed on the ground of a separable controversy. In the case of

Fraser v. Jennison, 106 U. S. 191 (27 Law Ed. 132),

it was said that to constitute a separable controversy "there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States, from those on the other."

The principle invoked by the Appellant in this case is thus expressed by Moon on the Removal of Causes, in Section 133, p. 362:

> "The language of the removal act does not, in terms, require a suit to be removable to be between citizens of different States or a suit between citizens of a State and foreign States, citizens or subjects, but that it be a suit 'in which there shall be a controversy between' such parties. Ordinarily, the controversy in a case is between all the plaintiffs on one side and all the defendants on the other. But sometimes this is not the case. When it so happens that the interest of the parties in a litigation is different from their nominal position as plaintiffs or defendants, they will be rearranged according to their actual interests in the controversy in determining the removability of a suit. All the parties interested in maintaining one side of the controversy will be placed on one side and those opposed to them will be placed on the other side. As thus arranged, the citizenship of all the plaintiffs in interest must be diverse from that of all the defendants in interest."

Applying that principle to the present case, we have a suit in which all of the parties interested in maintaining the suit upon the one side are citizens of the State of Pennsylvania, and the one sole party interested as a defendant, on the other, is a citizen and subject of the King of the United Kingdom of Great Britain and Ireland. The nominal defendant, Charles E. Lenhart, who is joined with the real defendant, Gerald Purcell FitzGerald, has no interest in the suit except as a co-trustee of the principal plaintiff, Josiah V. Thompson, Trustee, etc. This, as we have before shown, was expressly alleged in the petition for removal, and was fully established in the subsequent trial.

A very clear judicial expression of the rule referred to is found in the case of

> Evers vs. Watson, 156 U. S. 527 (39 Law Ed. 520),

in which Mr. Justice Brown said:

> "The position of Baldwin as defendant in the case was not conclusive as to his actual interest in the litigation. For aught that appears, his interests may have been identical with those of Watson, and adverse only to his alien co-defendants. In such case, it would have been perfectly competent for the Court to ascertain the real matter in controversy, and to have re-arranged the parties to the suit upon the opposite sides of such controversy, and thus sustain the jurisdiction of the Court. The power of the Court under the Act of 1875, thus to rearrange the parties, and to place them on different sides of the matter in dispute according to the actual facts, has been recognized by this Court in several cases. The Removal Cases, 100 U. S. 457 (25:593); Pacific R. Co. of Missouri v. Ketchum, 101 U. S. 289 (25:932); Harter vs. Kernochan, 103 U. S. 562 (26:411). If such were the case here, the suit would then stand as one, wherein two citizens of the same State were plaintiffs, and aliens were defendants, which would be removable, irrespective of the question, whether, under the second clause of the section a separate controversy between citizens and aliens could be removed. It would appear from the opinion of the District Judge that this was the view taken by him. Even if he had been mistaken as to the actual community of interest between Watson and Baldwin, as a matter of fact his decision in respect thereto would not be reviewable collaterally."

In the case of Myer v. The Delaware R. R. Const. Co., 100 U. S., p. 457 (25 Law Ed. 593), Mr. Justice Waite said:

> "Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. Coal Co. v. Blatchford, 11 Wall. 174 (78 U. S. XX., 180). Under the new law the mere form of the pleadings may be put aside and the parties, placed on different sides of the matter in dispute according to the facts."

See, also,

> Brown v. Trousdale, 138 U. S. 389, (34 Law Ed., p. 987);
>
> Merchant's Cotton Press Co., etc. v. Ins. Co., 151 U. S. 366, (38 Law Ed. 195).

As we have seen, the State Court was without power to determine the truth of the jurisdictional facts set up in the petition for removal, even if they had been denied by an answer; but no answer was filed. Where an application to remove presents disputed questions of fact, the United States Circuit Court is the only tribunal competent to determine the facts.

Thus, in the case of Stone v. South Carolina, 117 U. S. 430, (29 Law Ed. 962), Mr. Justice Waite said:

> "All issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State Court is at liberty to determine for itself whether on the face of the record, a removal has been effected. If it decides against the removal and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under Section 709 of the Revised Statutes."

See, also, Burlington, Cedar Rapids & Northern

Railroad Company vs. Charles L. Dunn, 122 U. S. 513, (30 Law Ed. 1159), where the said learned Justice said:

> "Immediately on the presentation of the petition for removal, the attorney for the plaintiff filed a counter affidavit to the effect that the plaintiff was not a citizen of Minnesota, but of the Territory of Montana. No further proof being offered on this point, the Court ruled that a case for removal had not been made out, and that the suit must be retained for trial. Accordingly, a trial was afterwards had in the State Court which resulted in a judgment against the Company. An appeal was then taken to the Supreme Court of the State, where the judgment of the District Court was in all respects affirmed, including the rulings on the question of removal. To reverse that judgment this writ of error was brought.
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> * * * * * * * *
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> "The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished."

In the case of

Kansas City Co. et al. vs. Daughtry, 138 U. S. 298, (34 Law Ed. 963),

this Court said:

> "It is true that the petition was not verified, contrary to good practice, and that Daughtry's affidavit was explicit, so that if the record had been filed in the Circuit Court, the cause would, as it then stood, have been remanded, *but this would not justify* the State Court in acting upon the facts, though it arrived at the same result."

See, also,

Myer vs. The Delaware R. R. Const. Co., 100 U. S., p. 457, (25 Law Ed. 593);

Missouri R. & T. R. R. Co. vs. Hickman, 183 U. S. 53, (46 Law Ed. 79);

Crehore vs. Ohio & M. R. Co., 131 U. S. 240, (33 Law Ed. 144);

Carson v. Hyatt, 118 U. S. 279, (30 Law Ed. 167);

Carson v. Dunham, 121 U. S. 421, (30 Law Ed. 992).

Although at the trial there was no shadow of a case made out against the alleged defendant, Lenhart, and no relief was sought against him, by leave of Court upon motion of counsel for plaintiff, he was retained in the formal position of a party defendant upon the record in the case. Upon this phase of the case it is pertinent to quote the following from Moon on the Removal of Causes, Sec. 131, p. 344:

> "A plaintiff must act in good faith. Where a person against whom no cause of action exists, and whose citizenship is such as to defeat a removal if he were a proper defendant, is joined as a co-party with the real defendant, making on paper a joint suit for the fraudulent purpose on the part of the plaintiff to prevent a removal by the real defendant, the courts will not permit such joinder to be effective for that purpose; so the presence of a plaintiff fraudulently joined to prevent a removal by the defendant, will not avail to defeat such removal."

III.

A CASE PROPER FOR REMOVAL HAVING BEEN REGULARLY PRESENTED TO THE STATE COURT, THE REMOVAL EO INSTANTE WAS EFFECTED, AND THE STATE COURT THEREAFTER WAS WITHOUT JURISDICTION IN THE CAUSE.

Moon on the Removal of Causes, Sec. 177, p. 493, says:

> "The State Court should accept a proper petition and bond in a removal case,—'It shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit'; so saith the statute."

Foster, on Federal Practice, likewise says: (page 1584, Sec. 391)

> "The State Court has the power to examine the petition and bond, in order to ascertain whether they are sufficient. If they are insufficient, it may disregard them and proceed with the suit; but its decision is subject to the review of the Federal Court.
>
> If the petition and bond are sufficient, it is divested of jurisdiction over the case. The State Court has no power to try questions of fact arising upon the petition, but must accept the facts therein alleged as true. As soon as a sufficient bond and petition are filed and presented, all subsequent action by the State Court is void.
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> * * * * * * *
>
> If the State Court continues to act in a case that has been properly removed, its final judgment may be reversed by a writ of error from the Supreme Court of the United States, after it has been affirmed by the highest court of the State in which a decision in the suit can be had."

The statements of the text writers upon that subject are fully supported by numerous cases. In the case of

Stone v. South Carolina, 117 U. S. 430, (29 Law Ed. 962),

Mr. Chief Justice Waite said:

> "It is undoubtedly true as was said in Steamship Co. v. Tugman, 106 U. S. 122 (Bk. 27 Law Ed. 89), that upon the filing of the petition and bond—the suit being removable under the statute—the

jurisdiction of the State Court absolutely ceases, and that of the Circuit Court of the United States immediately attaches."

To the same effect, also, are

Kern v. Huidekoper, 103 U. S. 485, (26 Law Ed. 354);
Williams et al. vs. Howland Coal & Iron Works, 19 Fed. 51;
Wills v. Baltimore & O. R. Co., 65 Fed. 532;
Missouri v. Fietdermann, 10 Fed. 20;
M'Cullough v. Large, 20 Fed. 309;
Monroe vs. Williamson et al., 81 Fed. 977.

IV.

THE JOINDER OF WILLIAM McCLELLAND, AS GUARDIAN AD LITEM, WITH THE PLAINTIFFS IN THE SUIT, WILL NOT DEFEAT THE DEFENDANT'S RIGHT TO A REMOVAL.

Even if it must be regarded that the citizenship of the minors and not that of their guardian *ad litem*, would control in determining the citizenship of the parties, the argument is without avail in this case, because the infant plaintiffs are obviously merely formal and in no sense necessary parties, and therefore their presence in the case cannot be urged to defeat the removal.

By the pleadings, the only interest of the defendant's minor children in the case is as *cestui qui trustent* under one of the trusts provided in the agreement sued upon. In this respect the only proper party plaintiff is the trustee in whom is vested the legal title. The interests of the minor children are, therefore, fully represented by the real plaintiff, Josiah V. Thompson, as trustee, for (the infant children), John Purcell Fitz-

Gerald, Edward Maurice FitzGerald, and Gerald Purcell FitzGerald.

In the case of Taylor v. Rockefeller, 23 Fed. Cas. 792, Mr. Justice Strong held that where a suit was brought against trustees and *cestuis que trustent* the latter were merely formal defendants—being fully represented by their trustees, and therefore their presence would not defeat a right to removal.

So, also, in Moon on the Removal of Causes, Section 132 p. 347 it is said:

> "In determining whether a suit is removable from a State Court to the Circuit Court of the United States, the citizenship of nominal or formal parties will be disregarded."

Wilson vs. Oswego Township, 151 U. S. 56 (38 Law Ed. 70);
Maryland ex rel. Markley v. Baldwin, 112 U. S. 490 (28 Law Ed. 822);
Bacon vs. Rives, 106 U. S. 99 (27 Law Ed. 69);
Relfe vs. Rundel, 103 U. S. 222 (26 Law Ed. 337);
Ward vs. Arredondo, 29 Fed. Cas. 167.

Complete proof of the wholly formal character of the guardian *ad litem*, in this case, is found in the fact that there is no prayer in the Bill directed to his relief.

As further illustrating the rule, it has been held:

> "That the officers are nominal defendants to a suit against a corporation and its officers, where the sole relief is against the corporation."

Pond vs. Sibley, 7 Fed. 129.

> "Where a plaintiff brings a suit to recover a sum of money alleged to be due him from the real

defendant, and joins as defendants persons who are alleged to 'have or claim to have adversely to said plaintiff, some interest in or lien upon the moneys due said plaintiff' such persons so joined are nominal defendants."

Shattuck v. North British & Mer. Ins. Co., 19 U. S. App. 215;

See, also,

Nelson v. Hennessey, 33 Fed. 113;
Arapahoe Co. v. Kansas Pac. R. Co., 1 Fed. Cas. 1080;
Arrowsmith v. Nashville & D. R. Co. 57 Fed. 165;
Hukill v. Maysville & B. S. R. Co., 72 Fed. 745;
Rivers v. Bradley, 53 Fed. 305;
Sioux City & D. M. Ry. Co. v. Chicago etc. Ry. Co., 27 Fed. 770.

> "A garnishee, if a party at all, is a nominal defendant. So a defendant in equity, who occupies substantially the same position as a garnishee at law, is a nominal defendant."

Bacon v. Rives, 106 U. S. 99.

Moreover, a guardian *ad litem*, is not a proper party plaintiff to a suit. The function of a guardian *ad litem* is to defend, not to sue. As was said by Hammond, J. (Circuit Court W. D. Tennessee) in the case of Woolridge, Assignee, etc. v. McKenna and others, 8 Fed. Rep. 650, on page 669 of the Report:

> "As I understand the chancery practice to which we are bound by equity rules 91 and 87, an infant always sues by his next friend and defends by his guardian *ad litem*."

Again, in the case of

> In re ESTATE OF McCLEAN, JR., 26 Federal Rep. 49,

Acheson, J., (Circuit Court, W. D. Pennsylvania), expressly ruled that, "upon a question of the right of removal, the citizenship of the *guardian suing, and not that of his ward,* is the test of jurisdiction."

No United States Supreme Court decision is found to the contrary, but it is attempted to argue that the case of Lamar v. Micou, 112 U. S. 452, is authority for a different view. An examination of that case, however, shows that it does not touch the question. There the question was one of the degree of care with which a guardian was charged in the investment of his ward's estate. The guardian was appointed by the Surrogate Court of the County of Richmond, in the State of Alabama, of an infant resident in that county. He subsequently removed to New York, where he died, and where his will was probated and an executor thereof appointed. The suit was between the administrator of the ward, who also died, and the executor of the deceased guardian, praying for an account. Mr. Justice Gray, delivered the opinion of the Court. He stated the question involved in the following words:

> "The rules of investment varying so much in the different States, it becomes necessary to consider by what law the management and investment of the ward's property should be governed."

and then decided as follows:

> "The preference due to the law of the ward's domicil, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property should be governed by the law of the State of his domicil, especially when he actually

> resides there, rather than by the law of any State in which the guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the State of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from State to State, from consideration of health, education, pleasure or convenience, and guardians were appointed in each State, the guardians appointed in the different States, even if the same persons might be held to diverse rules of accounting for different parts of the ward's property. The form of the accounting, so far as concerns the remedy only, must indeed be according to the law of the court in which relief is sought; but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicil of the ward.
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> * * * * * * *
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> "Whether the domicil of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicil was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicil."

The question of the Removal of Causes was not in any sense raised in that case and it was only in connection with the question above stated, that the Court said:

> "The case of such a guardian differs from that of an executor of or a trustee under a will. In the one case, the title in the property is in the executor or the trustee; in the other the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment."

Moon on the Removal of Causes, Section 134, page 363, *et seq.*, says:

> "Sec. 134. Where a party sues or is sued in a representative capacity, his personal citizenship controls the question of jurisdiction, and not the place of his appointment or the citizenship of the beneficiaries whom he represents.
>
> Where a suit is brought by or against a party in a representative capacity, his personal citizenship controls the question of Federal jurisdiction, so far as such jurisdiction depends upon the citizenship of such party. This rule applies to suits by or against trustees, administrators and executors, guardians, receivers and officers of joint stock associations, such as express companies.
>
> The official citizenship of a representative party—the place of appointment—is not material, nor is the citizenship of the beneficiaries for whom he is acting, a matter of moment, nor the citizenship of a decedent whose estate is represented by an executor or administrator."

In the present case both Josiah V. Thompson, Trustee, and William McClelland, guardian *ad litem*, are citizens of the State of Pennsylvania, as the petition for removal expressly alleges.

V.

THE UNITED STATES SUPREME COURT HAS JURISDICTION TO REVIEW THE ACTION OF THE STATE COURTS, IN THEIR DENIAL TO THE APPELLANT OF HIS APPLICATION TO REMOVE THE CAUSE INTO THE FEDERAL COURT OF THE PROPER DISTRICT.

Moon on the Removal of Causes, Sec. 180, p. 553, says:

> "If the State Court in which the petition for

> removal is filed shall deny the petition, a right of review by appeal or writ of error is given in most if not all, of the States, in a State Court of appellate jurisdiction.
>
> If the denial of the petition for removal is affirmed by the highest court of the State in which a review of the ruling may be had, final judgment having been rendered in the State Court against the petitioner, such action may be reviewed by the Supreme Court of the United States upon a writ of error to such highest State Court."

The Supreme Court of the State of Pennsylvania is the highest Appellate Court in the State. It has reviewed the action of the Court of Common Pleas of Fayette County, Pennsylvania, and has affirmed the denial of the petition of the Appellant to remove the cause into the Federal Court.

In the case of Myer v. The Delaware R. R. Const. Co., 100 U. S., p. 457, (25 Law Ed. 593), Mr. Chief Justice Waite said:

> "It is still further claimed that even though the lower Court ought to have accepted the petition and bond and withheld all further proceedings in the suit, that error was waived by the subsequent appearance of Dennison and going to a hearing and that, for this reason, it was right for the Supreme Court not to reverse the judgment because of the original fault. This question is settled by the case of Insurance Co. vs. Dunn 19 Wall., 214 (86 U. S. XXII 68) where it is distinctly held that if a party failed in his efforts to obtain a removal and was forced to trial, he lost none of his rights by defending against the action. This record is full of protest on the part of Dennison against going on with the suit and of exceptions to the ruling which kept him in Court. Indeed, it is difficult to see what more he could have done than he did do to get out of court and take his suit with him. He remained simply because he was

forced to remain and is certainly now in a condition to have the original error, of which he complained, corrected in any court having jurisdiction for that purpose."

A similar appeal was

Merchants' Cotton Press Co. vs. Ins. Co. of North America, 151 U. S. 366 (38 Law Ed. 195);
Missouri K. & T. R. R. Co. vs. Hickman, 183 U. S., p. 53 (46 Law Ed. 791);
Stone v. South Carolina, 117 U. S. 430 (29 Law Ed. 962);
Southern Railway Co. vs. Allison, 190 U. S. 326 (47 Law Ed. 1078);
Railway Co. vs. Bohon, 200 U. S. 221;
Kansas City Co. et al. vs. Daughtry, 138 U. S. 298 (34 Law Ed. 963);
Burlington C. R. & N. R. Co. v. Dunn, 122 U. S. 513 (30 Law Ed. 1159);
National Steamship Co. v. Tugman, 106 U. S. 118 (27 Law Ed. 87);
Gordon v. Longest, 16 Pet. 97 (10 Law Ed. 900);
Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556 (40 Law Ed. 536).

CONCLUSION.

It is respectfully submitted that the petition of the alien appellant in the State Court for the removal of the proceedings set forth facts establishing proper jurisdictional grounds under the Acts of Congress; that the facts set forth in his petition were not controverted by any answer; that the state of the record at the time the petition was filed and the removal denied by the State

Court then entitled the appellant to have the cause removed, and that the subsequent proceedings in the State Court now of record here, established the verity of the averments of the petition for removal.

Finally, it is submitted that this Court will take cognizance of the controlling and convincing fact disclosed by the record now before it, that the judgment and decree of the State Court embracing the entire controversy was against this alien appellant alone—which is conclusive demonstration of the fact, as averred in the petition for removal, that a re-alignment of the parties according to their real interests in the subject-matter of the litigation, would make this alien appellant the sole defendant, and this would give the Circuit Court of the United States for the Western District of Pennsylvania jurisdiction.

For the reasons above set forth, it is submitted the motion to dismiss or affirm should be refused.

William A. Stone,
Michael J. Ryan,
James Gay Gordon,
Counsel for Appellant.

FITZ GERALD *v.* THOMPSON.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 849. Submitted December 18, 1911.—Decided January 15, 1912.

Where the record plainly shows that to convert a party defendant into a party plaintiff would be wholly inconsistent with the relief which it is the object of the suit to obtain, the court will not realign such defendant as a plaintiff so as to enable another defendant to remove the case to the Federal court.

Where, as in this case, the plaintiffs charge one of the defendants with repudiation of obligations and ask his removal as trustee, the claim made at the instance of a co-defendant seeking to remove the case, that he should be realigned as a party plaintiff, is manifestly frivolous.

THE facts are stated in the opinion.

Mr. Samuel Untermyer, with whom *Mr. William J. Sturgis* and *Mr. Irwin Untermyer* were on the brief, in support of the motion.

Mr. William A. Stone, with whom *Mr. Michael J. Ryan* and *Mr. James Gay Gordon* were on the brief, in opposition thereto.

Memorandum opinion by direction of the court. By MR. CHIEF JUSTICE WHITE.

The object of this suit was to enforce a trust created by the plaintiff in error for the benefit of his wife and three minor children, to declare a lien on certain property dedicated to the purposes of the trust, for the removal of two trustees, etc. Josiah V. Thompson, one of the trustees, was a plaintiff, and joined with him were the wife and minor children of Fitz Gerald, the latter represented by their guardian *ad litem*. The remaining trustees were made defendants, individually and in their capacity as trustee and as partners.

All the plaintiffs except the minor children were citizens of Pennsylvania. The minor children were aliens and resided in Ireland. Lenhart, one of the defendants, was a citizen of Pennsylvania, while Fitz Gerald, his co-defendant, was an alien and a British subject. Fitz Gerald applied to remove to the United States court on the ground that on properly aligning the parties to the controversy, his co-defendant Lenhart was a plaintiff, and that as the residence of the guardian *ad litem* was controlling so far as the interest of the minors was concerned, the controversy was one between citizens of Pennsylvania on the one hand and Fitz Gerald, an alien, on the other. The further contention was urged that the cause was embraced in the clause of § 1 of the Removal Act of 1887–8 (March 3, 1887, 24 Stat. 552, c. 373) conferring original jurisdiction upon Circuit Courts of controversies "between citizens of a State and foreign states, citizens, or subjects," and that the following clause of the second section of the act was applicable:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of that State."

The trial court denied the application and subsequently granted the relief prayed by the bill. On appeal the Supreme Court of the State of Pennsylvania affirmed the decree, and in the opinion delivered held that no error was committed in denying the application to remove. Because of this latter ruling the cause was brought here. The defendants in error now move to dismiss the writ.

The right to remove from the state court which was asserted had no legal foundation. Lenhart was charged with a repudiation of his obligations as trustee by a refusal to apply the trust funds as required by the trust agreement. Not only was an accounting by him asked and an injunction prayed to prevent him from disposing of the partnership property which was dedicated to the trust, but his removal as trustee was also sought. Under these circumstances it is plain on the face of the record that no possible rearrangement of the parties could have been made converting Lenhart into a party plaintiff which would be consistent with the relief which it was the object of the suit to obtain. In this state of the case the assertion that there was a denial of a Federal right by the overruling of the application to remove is so manifestly frivolous and devoid of merit as not to form the basis of jurisdiction and to render it necessary to grant the motion to dismiss.

Writ of error dismissed.